(24)

No. 03-855
Title: City of Sherrill, New York, Petitioner
v.
Oneida Indian Nation of New York, et al.
Docketed: December 11, 2003
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (01-7795, 01-7797)
Decision Date: July 21, 2003
Rehearing Denied: September 15, 2003
Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Dec 21 2001 | Letter, dated December 17, 2004 received from counsel for the petitioner December 21, 2004 |
| Dec 11 2003 | Petition for a writ of certiorari filed. (Response due January 12, 2004) |
| Jan 8 2004 | Order extending time to file response to petition to and including January 20, 2004. |
| Jan 13 2004 | Brief amici curiae of Counties of Madison and Oneida, New York filed. |
| Jan 20 2004 | Brief of respondent Oneida Indian Nation of New York in opposition filed. |
| Jan 20 2004 | Brief amicus curiae of New York filed. |
| Jan 30 2004 | Reply of petitioner City of Sherrill, New York filed. |
| Feb 4 2004 | DISTRIBUTED for Conference of February 20, 2004. |
| Feb 23 2004 | The Solicitor General is invited to file a brief in this case expressing the views of the United States. |
| May 28 2004 | Brief amicus curiae of United States filed. |
| Jun 2 2004 | Supplemental brief of petitioner City of Sherrill, New York filed. |
| Jun 8 2004 | DISTRIBUTED for Conference of June 24, 2004. |
| Jun 10 2004 | Letter dated June 8, 2004 from counsel for amici, Counties of Madison and Oneida received. (Distributed). |
| Jun 28 2004 | Petition GRANTED. |
| Aug 12 2004 | Joint appendix filed. |
| Aug 12 2004 | Brief of petitioner City of Sherrill, New York filed. |
| Aug 12 2004 | Brief amicus curiae of New York filed. |
| Aug 12 2004 | Brief amici curiae of Cayuga and Seneca Counties, et al. filed. |
| Aug 12 2004 | Brief amici curiae of Town of Lenox, New York, et al. filed. |
| Aug 12 2004 | Brief amicus curiae of Counties of Madison and Oneida, New York filed. |
| Aug 12 2004 | Brief amicus curiae of Citizens Equal Rights Foundation filed. |
| Aug 13 2004 | Extension of time within which to file respondents' brief on the merits to and including September 30, 2004. |
| Sep 20 2004 | Motion of New York for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Sep 29 2004 | Letter of respondent proposing lodging of maps and Annual Reports of the Commissioner of Indian Affairs received. |
| Sep 30 2004 | Brief amicus curiae of United South and Eastern Tribes, Inc. filed. |
| Sep 30 2004 | Brief amicus curiae of United States filed. |

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| Sep 30 2004 | Brief amici curiae of Cayuga Nation of New York, et al. filed. |
| Sep 30 2004 | Brief amicus curiae of National Congress of American Indians filed. |
| Sep 30 2004 | Brief amici curiae of Puyallup Tribe of Indians, et al. filed. |
| Sep 30 2004 | Brief of respondents Oneida Indian Nation of New York, et al filed. |
| Oct 4 2004 | Application (04A271) to extend the time within which to file the reply brief on the merits, submitted to Justice Ginsburg. |
| Oct 7 2004 | Application (04A271) granted by Justice Ginsburg to extend the time within which to file the reply brief on the merits to and including November 18, 2004. |
| Oct 12 2004 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Nov 1 2004 | Motion of New York for leave to participate in oral argument as amici curiae and for divided argument GRANTED. |
| Nov 1 2004 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Nov 12 2004 | SET FOR ARGUMENT ON Tuesday, January 11, 2005. |
| Nov 12 2004 | CIRCULATED. |
| Nov 18 2004 | Reply of petitioner City of Sherrill, New York filed. (Distributed) |
| Dec 2 2004 | Letter from counsel for petitioner requesting permission to lodge excerpts from Annual Reports. |
| Dec 17 2004 | Letter from Attorney General of New York advising of recent developments received. (Distributed). |
| Dec 21 2004 | Letter dated December 17, 2004 received from counsel for the petitioner December 21, 2004. (Distributed). |
| Dec 23 2004 | Letter dated December 21, 2004 received from counsel for the respondent. |
| Jan 11 2005 | Argued. For petitioner: Ira S. Sacks, New York,N.Y.; and Caitlin J. Halligan, Solicitor General, New York, N.Y. (for N.Y., as amicus curiae.) For respondents: Michael R. Smith, Washington, D.C.; and on behalf of the United States, as amicus curiae, Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. |

Supreme Court, U.S.
FILED

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No. 03-

IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner*,

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether alleged reservation land is Indian Country pursuant to 18 U.S.C. § 1151 and this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*") where the land was neither set aside by the federal government nor superintended by the federal government?

2. Whether alleged reservation land was set aside by the federal government for purposes of Indian Country analysis under 18 U.S.C. § 1151 and *Venetie* where the alleged reservation was established by the State of New York in the 1788 Treaty of Fort Schuyler, and not by any federal treaty, action or enactment?

3. Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneida's alleged New York reservation?

4. Whether alleged reservation land may (i) remain Indian Country or (ii) be subject to the protections of the Non-Intercourse Act, 25 U.S.C. § 177, if the tribe claiming reservation status and Non-Intercourse Act protection ceases to exist?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were petitioner City of Sherrill, New York and respondents Oneida Indian Nation of New York, Ray Halbritter, Keller George, Chuck Fougnier, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Beulah Green, Brian Patterson and Iva Rodgers. Respondent Ruth Burr was a party in the district court and Second Circuit, but a suggestion of death of Ruth Burr was filed in the Second Circuit on May 10, 2002. Madison County, Oneida County and the State of New York appeared as *amici curiae* in the district court and Second Circuit.



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The opinion of the United States Court of Appeals for the Second Circuit is reported at 337 F.3d 139 and appears in the Appendix at A1-A60. The order denying the Petition for Rehearing or Rehearing *en banc* is unreported and appears in the Appendix at A134-A135. The memorandum decision and order of the district court is published at 145 F. Supp.2d 226 and appears in the Appendix at A61-A133.

## JURISDICTION

The judgment of the Court of Appeals was issued on July 21, 2003. The Petition for Rehearing or Rehearing *en banc* was denied on September 15, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Supreme Court Rules 14(f) and 14(i)(v), the following treaty and statutory provisions are involved in the case and appear in the Appendix: The 1788 Treaty of Fort Schuyler, September 22, 1788; the 1794 Treaty of Canandaigua, November 11, 1794, 7 Stat. 44; the 1838 Treaty of Buffalo Creek, January 15, 1838, 7 Stat. 550; 18 U.S.C § 1151; 25 U.S.C § 177; 25 U.S.C. § 233; and 25 U.S.C. § 465.

## STATEMENT OF THE CASE

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of *certiorari* to review the decision of the Second Circuit. The Indian land claim issues arising in this Petition are of critical importance to the State of New York and municipalities such as the City of Sherrill. The Oneida Indian Nation alone lays claim to 300,000 acres in central New York. Similar claims

exist for other Indian tribes in New York and elsewhere. If the decision of the Second Circuit is not reviewed and reversed, the tax base and viability of cities such as the City of Sherrill – across New York and elsewhere – will be imperiled.

Moreover, the Second Circuit's decision is: (i) in direct conflict with precedents of this Court (such as *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998); *New York Indians v. United States*, 170 U.S. 1 (1898); and *United States v. New York Indians*, 173 U.S. 464 (1899)); (ii) ignores the express provisions of two Indian treaties, the 1788 Treaty of Fort Schuyler and the 1838 Treaty of Buffalo Creek, 7 Stat. 550; and (iii) grossly expands the reach of the Indian Trade and Non-Intercourse Act (the "Non-Intercourse Act"), currently codified at 25 U.S.C. § 177, in direct conflict with decisions of other United States Courts of Appeals.

In the 1788 Treaty of Fort Schuyler, prior to the effective date of the United States Constitution, the New York Oneidas ceded all of their territory to the State of New York. That cession terminated all aboriginal title. The State of New York then set aside approximately 300,000 acres for the New York Oneidas' future use. In 1794, the federal government, in the Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create a reservation for the Oneidas.

The New York Oneidas sold much of the 300,000 acres set aside by the State of New York, including a sale in 1805 to an individual Oneida Indian who then conveyed the land at issue in this Petition. In the centuries that followed, the conveyed land remained outside the possession of the Oneidas, held by private landowners.

In 1997, using proceeds from its casino in central



New York State, the Oneida Indian Nation of New York ("OIN") purchased several parcels of land on the open market, including those in the City of Sherrill upon which the disputed properties are situated (the "Properties"). Wrongly claiming that it had come back into possession of a portion of its ancestral Indian reservation established in 1794 by the Treaty of Canandaigua, the OIN refused to pay property taxes or collect sales taxes in connection with the Properties. The litigation giving rise to this Petition ensued.

The governing treaties and this Court's controlling case law compel the conclusion that the Properties are not Indian Country pursuant to 18 U.S.C. § 1151. First, the land at issue was neither set aside nor superintended by the federal government. Rather, the land was set aside for the use of the New York Oneidas by the State of New York in the 1788 Treaty of Fort Schuyler. For two centuries, State and local governments have provided all services with respect to the land at issue. As a result, under *Venetie*, the land at issue is not Indian Country pursuant to 18 U.S.C. § 1151, and may be taxed by the City of Sherrill.

Second, the 1838 Treaty of Buffalo Creek, 7 Stat. 550, required the New York Oneidas to abandon all lands in the State of New York and remove to Kansas, thus terminating any remaining New York Oneida reservation. The New York Oneidas sued to recover the value of the Kansas land it received in exchange for abandoning New York, and shared in the nearly $2 million recovery. *New York Indians v. United States*, 170 U.S. 1 (1898); *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the New York Oneidas sought and received the benefit of the Kansas reservation established in the 1838 Treaty of Buffalo Creek in exchange for any New York reservation.

Third, there was substantial evidence below that the New York Oneidas ceased to exist as a tribe for decades in the late nineteenth and early twentieth centuries. If tribal status ceased, Indian Country status and the protections of the Non-Intercourse Act, 25 U.S.C. § 177, ceased, and the only way that the New York Oneidas could recover reservation status was by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Thus, at the very least, summary judgment for the Oneida Indian Nation was improper.

**The Parties**

Petitioner City of Sherrill is a municipal corporation organized under the laws of the State of New York. It is New York's smallest city, occupying one and one-half square miles, with a population of approximately 3,000. Its total annual budget is approximately $2.4 million.

Respondent Oneida Indian Nation of New York ("Oneida Indian Nation") is presently a federally recognized Indian tribe governed by a Nation Representative and a Tribal Council. Respondent Ray Halbritter is the Nation Representative, chief executive officer of the Oneida Nation enterprises, and one of the members of the Council. The other Respondents are members of the Council.

**The Relevant History of the Oneida Indians**

Prior to and during the Revolutionary War, the colonists respected the Oneidas' right to possession of their aboriginal lands, which totaled approximately six million acres in central New York. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d 226, 233-34 (N.D.N.Y. 2001). In 1788, in the Treaty of Fort Schuyler with the State of New York, the Oneidas sold all of their land to the State of New



York, which at the same time created a 300,000-acre reservation for use by the Oneidas. *Id.* That treaty and sale terminated aboriginal title to the land.

Two years later, in 1790, Congress passed the Non-Intercourse Act, currently found at 25 U.S.C. § 177, which required the federal government to approve all sales or transfers of land from any Indian nation or Indian tribe. *Id.* The Non-Intercourse Act, however, did not limit the right of the States to engage in transactions where aboriginal title had already been extinguished. *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 232 (1985). As they had prior to the passage of the Non-Intercourse Act, the Oneidas continued to sell large portions of the land that New York State had set aside for their use.

In the 1794 Treaty of Canandaigua, 7 Stat. 44, the federal government in Article II merely "acknowledge[d]" what remained of an Oneida reservation in New York, and agreed that "the . . . reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." That is to be contrasted with the treatment of the Senecas, whose reservation was established by Article III of the treaty.

Beginning one year later, in 1795, the Oneidas sold most of what remained of their 300,000-acre reservation created by the State of New York. *Oneida Indian Nation*, 145 F. Supp.2d at 234. Since 1795, title to portions of this land has passed through voluntary, free-market transactions. *Id.* The transactions that conveyed the Properties at issue in this case occurred in 1805, when the Properties were conveyed by a group of Oneida Indians to Cornelius Dockstader, an Oneida Indian. In 1807, Dockstader conveyed them to Peter Smith, a non-Indian. *Id.* at 243.

Beginning in the early nineteenth century, the federal

government's policy toward the Indians changed from respect for the Indians' possession of their ancestral lands to removal of the eastern Indians to lands in the western United States. Between 1820 and 1822, and in keeping with the federal government's new policy, some New York Indians, including some Oneidas, relocated to land the federal government purchased for them in the state of Wisconsin. *Id.* at 234-35. Other Oneidas relocated to Ontario, Canada. *Id.* at 235. Thus, the Oneidas split into three distinct groups: the New York Oneidas, the Wisconsin Oneidas and the Canadian Oneidas (also known as the Thames Oneidas). *Id.* The Oneida Indian Nation claims to be a successor to the New York Oneidas.

The federal government codified its removal policy in the Indian Removal Act, passed by Congress in 1830, which authorized the federal government to give land west of the Mississippi River to Indians in exchange for their eastern land. *Id.* "The core purpose of the federal removal policy was to mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

One result of the federal policy of removal was the 1838 Treaty of Buffalo Creek, 7 Stat. 550, an obligatory removal treaty in which several Indian tribes, including the New York Oneidas, agreed to remove to Kansas. In Article 2 of the treaty, the United States designated a 1,824,000-acre reservation in what is now the State of Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States . . ." In Article 13, the New York Oneidas



agreed to remove to their new home in Kansas.[1]

Although most of the remaining New York Oneidas did not move to Kansas to live on the reservation designated for their benefit in the Treaty of Buffalo Creek, they and other New York Indian tribes sued the United States for the value of the Kansas lands after the federal government sold the Kansas lands to homesteaders. *New York Indians v. United States*, 170 U.S. 1 (1898). Their lawsuit was successful, and the New York, Wisconsin and Thames Oneidas shared in the nearly $2 million recovery. *Id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the Oneidas sought and received the benefit of the Kansas reservation established in exchange for their New York reservation in the 1838 Treaty of Buffalo Creek.

There is substantial evidence that, following the 1838 Treaty of Buffalo Creek, the New York Oneidas ceased to exist as a tribe for nearly a century. For example, in 1877 a district court noted that "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877).

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1 At the time of the 1838 Treaty of Buffalo Creek, there were 620 Oneidas in New York and 600 in Wisconsin. Most of the remaining Oneidas left New York in the next few years. *The Oneida Indian Experience: Two Perspectives*, 61 (J. Campisi and L. Hauptman eds. 1988).

Similarly in 1891, the federal government explained that "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*. That same observation was oft repeated over the following decades. *See 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*; *1900 Annual Reports of the Department of the Interior*; *1901 Annual Reports of the Department of the Interior*; *1906 Annual Reports of the Department of the Interior*. That point is also made in the 1892 Census map of New York, which depicts no Oneida reservation.

That situation persisted into the mid-twentieth century. For example, the record below established that in 1925, an Assistant Commissioner of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

**The Action Below**

In 1997 and 1998, the Oneida Indian Nation used the proceeds from its Turning Stone casino in Verona, New York to purchase several businesses and properties in Madison and



Oneida Counties, New York in open-market transactions with private parties. Included in these purchases were the Properties in Sherrill upon which the Oneida Indian Nation operates a gas station having an attached convenience store and a textile manufacturing and distribution facility.

Contending that the Properties were located within its historical reservation, the Oneida Indian Nation refused to pay property taxes assessed by Sherrill on the land and structures, or to collect sales tax on sales of merchandise sold at their businesses. Sherrill sent the Oneida Indian Nation notices of tax delinquency for the Properties and thereafter conducted a tax sale, purchased the Properties and initiated eviction proceedings in New York State Supreme Court (the "Eviction Case").

The Oneida Indian Nation then sued Sherrill in the United States District Court for the Northern District of New York, seeking a declaratory judgment that the Properties were situated on land that was part of its historic reservation, established by the 1794 Treaty of Canandaigua and, therefore, exempt from state and local taxation (the "Lead Case"). The Oneida Indian Nation also removed the Eviction Case to federal court, and contended that Sherrill's claims were barred by sovereign immunity. In response, Sherrill commenced an action against the individual members of the Oneida Tribal Council (the "Members Case"). The Eviction, Lead and Members Cases were subsequently consolidated and adjudicated in district court.

The United States District Court for the Northern District of New York had subject matter jurisdiction to adjudicate the consolidated cases. In the Lead Case, Oneida Indian Nation asserted numerous bases for federal jurisdiction, including 28 U.S.C. §§ 1361-62; 42 U.S.C. § 1983;, the Indian Commerce Clause (Art. I, § 8) and the Due Process Clause (Amend. XIV) of the United States

Constitution; 25 U.S.C. § 177; the 1794 Treaty of Canandaigua; and federal common law. The Eviction Case and the Members Case involve similar facts as the Lead Case. The Eviction Case was filed by Sherrill in local court and removed by Oneida Indian Nation to district court based upon many of the same assertions of federal jurisdiction as in the Lead Case. Subject matter jurisdiction in the Members Case was predicated on the same bases as the Lead Case.

In a June 4, 2001 memorandum-decision and order, the district court: (1) denied Sherrill's motion in the Lead Case for summary judgment or, alternatively, a preliminary injunction enjoining Oneida Indian Nation from purchasing additional properties in Sherrill; (2) granted the Oneida Indian Nation's cross motion for summary judgment in the Lead Case and granted Oneida Indian Nation's motion for summary judgment in the Eviction Case; (3) granted summary judgment dismissing Sherrill's counterclaims against the Oneida Indian Nation in the Lead Case; (4) granted defendants' motion to dismiss the Members Case; and (5) denied Sherrill's motion for leave to amend its answer in the Lead Case. *Oneida Indian Nation*, 145 F. Supp.2d at 266-67 (N.D.N.Y. 2001).[2]

The City of Sherrill appealed and, to the extent pertinent here, the Second Circuit affirmed (in a 2-1 decision), with Senior Circuit Judge Van Graafeiland dissenting. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Court of Appeals found that the Properties were Indian Country because the reservation had been established, not by New York State in the 1788 Treaty of Fort Schuyler, but rather by the federal government in the 1794 Treaty of Canandaigua, 7 Stat. 44. The Second Circuit

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2 That same day, the district court also entered three separate final judgments disposing of all parties' claims.



rejected any notion that the 1838 Treaty of Buffalo Creek, 7 Stat 550, required the New York Oneidas to abandon New York State. Finally, the Second Circuit held that tribal continuity is not required for a tribe to maintain reservation status and Non-Intercourse Act protection – that is, a reservation and Non-Intercourse Act protection continues even if a tribe ceases to exist. 337 F.3d at 155-56, 158-65, 165-68. The City of Sherrill petitioned for rehearing or rehearing *en banc*; that petition was denied on September 15, 2003.

**The Status of Oneida Indian Nation's Properties Today**

This case is one of many lawsuits the Oneida Indian Nation has filed in an attempt to undo the 1788 Treaty of Fort Schuyler, 1838 Treaty of Buffalo Creek and the land transactions its ancestors entered into with New York State beginning two hundred years ago. The decisions summarized below place the Oneida Indian Nation's dispute with Sherrill in context.

*Oneida Indian Nation of New York State v. County of Oneida, New York*, 414 U.S. 661 (1974) ("*Oneida I*") – In 1970, the Oneida Indian Nation and the Wisconsin and Thames Oneidas brought suit against Oneida and Madison Counties (the "Counties") in the Northern District of New York to recover the fair rental value of certain land possessed by the Counties for the period January 1, 1968 through December 31, 1969. *Id.* at 664-65. The Oneidas claimed that the land at issue was part of the 300,000 acres sold by the Oneidas to New York State in 1795, allegedly in violation of the Non-Intercourse Act. *Id.* This Court held that the Oneidas' complaint stated a controversy arising under the Constitution, laws, or treaties of the United States, and therefore that the district court erred in dismissing it for lack of federal question jurisdiction. *Id.* at 666.

*County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("*Oneida II*") – This Court in *Oneida I* remanded the case to the district court for trial. On remand, after a trial in which the Counties presented no evidence, the district court held, *inter alia*, that the Counties were liable for wrongful possession of the lands conveyed to New York State in 1795 because that conveyance violated the Non-Intercourse Act. *Id.* at 232-33. The Court awarded damages for the fair rental value of the land for the two-year period specified in the complaint. *Id.* at 230. The district court's decision was appealed. This Court held that the Oneidas could maintain an action for violation of their possessory rights based on federal common law and that the action was not barred by the statute of limitations, abatement, ratification or nonjusticiability. *Id.* at 240-50. This Court declined to rule on whether laches barred the Oneidas' claim. *Id.* at 244-45.

*Oneida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000) ("*Oneida III*") - In 1974, the Oneida Indian Nation and the Wisconsin Oneidas commenced another action against the Counties, alleging that beginning in the 1790's, the State of New York illegally acquired approximately 250,000 acres of Oneida Indian land. *Id.* at 66. That case – commonly referred to as the "Land Claim Case" – remained inactive while the Oneidas pursued their so-called test case (which resulted in *Oneida I* and *Oneida II*). *Id.* In 1998, the Land Claim Case became active when the United States intervened, and the Oneidas moved to amend their complaint to: (1) add the Thames Oneidas as plaintiffs; (2) add the State of New York as a defendant; and (3) add approximately 20,000 private landowners, the New York State Thruway Authority, Niagara Mohawk Power Corporation and Oneida Valley National Bank (collectively, the "private landowners") as defendants. *Id.* at 67-68. The Oneidas sought to add private landowners as defendants to collect damages from them and/or eject them from their



homes. *Id.*

On September 25, 2000, the district court granted the Oneidas' motions to add the Thames Oneidas as a plaintiff and the State of New York as a defendant. The court, however, denied the Oneidas' motion to add the private landowners as defendants in the suit, holding that a claim to eject current landowners would be futile because the Oneidas were not entitled to possession of the land. *Id.* at 92-93.

## REASONS FOR GRANTING THE WRIT

### I. CONTRARY TO THE DECISION BELOW, UNDER THIS COURT'S DECISION IN *VENETIE* AND THE 1788 TREATY OF FORT SCHUYLER, THE PROPERTIES ARE NOT INDIAN COUNTRY BECAUSE THE LAND WAS SET ASIDE BY THE STATE OF NEW YORK AND SUPERINTENDED BY STATE AND LOCAL GOVERNMENTS

The Second Circuit's decision below must be reviewed and reversed because it ignores this Court's holding in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), that for property to be Indian Country and exempt from taxation it (1) must have been set aside by the federal government for use of Indians as such; and (2) must be under the superintendence of the federal government. The Properties here were neither: they were set aside and superintended by the State of New York and local governments.

This Court has explained that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.'" *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

Whatever the word "reservation" means in other contexts, reservation status for Indian Country purposes is a term of art.

The Properties the Oneida Indian Nation purchased in Sherrill are not Indian Country. Indian Country is limited to:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).

Although § 1151 has three prongs[3] – reservations, dependent Indian communities and allotments – this Court made clear in *Venetie*, 522 U.S. at 527, that the essential nature of Indian Country is the same under all three prongs of the statute: the land (1) must be set aside by the federal government for use of Indians as such and (2) must be under the superintendence of the federal government. In *Venetie*, this Court explained that, in enacting § 1151 in 1948, Congress codified two requirements that the Court had previously held necessary for a finding of Indian Country generally – (1) federal set-aside and (2) federal

[3] Only the "reservations" prong of § 1151 is at issue in this case. Moreover, the Oneida Indian Nation concedes that, if the Properties are not Indian Country, then the Properties are not exempt from taxation.



superintendence. *Venetie*, 522 U.S. at 527.

In the words of the this Court,

> [In our prior cases] . . . we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, dependent Indian communities, and allotments.

*Id.* at 530 (citations omitted). Neither federal set aside nor superintendence is present here. As a result, this Court should grant the Petition and reverse the decision below.

### A. The Properties Were Set Aside By The State of New York

The Second Circuit ignored the express language of the 1788 Treaty of Fort Schuyler in concluding that the Properties were set aside by the federal government. The initial paragraph of the 1788 Treaty of Fort Schuyler states, in its entirety, "The Oneidas do cede and grant all their lands to the people of the State of New York forever."[4] Of this grant, New York reserved a 300,000-acre tract for the Oneidas' "specified uses." Thus, it cannot be questioned that it was the State of New York, and not the federal

[4] Occurring prior to the effective date of the United States Constitution, this sale was totally lawful. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1148 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

government, that set aside for use by the Oneidas the land upon which the Properties are situated.

The Second Circuit ignored the Treaty of Fort Schuyler and found that the Oneida reservation was set aside by the 1794 Treaty of Canandaigua. 337 F.3d at 155-56. That is incorrect (although that same observation appears as *dicta* in many cases where the issue was not directly litigated). Rather, the 1794 Treaty of Canandaigua merely – and expressly – "acknowledged" the land reserved by New York State for the Oneidas.

Thus, in the 1794 Treaty of Canandaigua with the Six Nations of the Iroquois,[5] Article II provides, in pertinent part, that

> "The United States acknowledges the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof . . ."

That is to be contrasted with Article III of the treaty, which expressly establishes a reservation for the Senecas.

Accordingly, the 1794 Treaty of Canandaigua was nothing more than a mere acknowledgment by the federal government of the Oneida reservation created by New York State through the 1788 Treaty of Fort Schuyler. Neither in the Treaty of Canandaigua nor elsewhere did the federal

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5 The Six Nations consisted of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora nations.



government even purport to designate this land as Indian Country.

As in *Venetie*, the Oneidas own the Properties in Sherrill in fee simple and are free to use them for any purpose, including any non-Indian purpose. Additionally, the Oneida Indian Nation owns the Properties free from any and all federal government restrictions. The Properties simply are not located within "a reservation under the jurisdiction of the United States government." *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 883-84 (9th Cir. 1999) ("The [Navajo land in question] is not [Indian Country] because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government"); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993) (United Keetoowah Band of Cherokee Indians' ("UKB") businesses were not located on land set aside by the federal government for purposes of 18 U.S.C. § 1151(b) because title was held by UKB in fee simple and "[n]o action ha[d] been taken by the federal government indicating that it set aside the land for use by the UKB").

At bottom, the 1794 Treaty of Canandaigua did not set aside an Oneida reservation. Rather, that land was set aside by the State of New York in the 1788 Treaty of Fort Schuyler. As a result, the land on which the Properties are situated was not set aside by the federal government for use by the Oneidas. Therefore, under this Court's decision in *Venetie*, the Properties are not Indian Country pursuant to 18 U.S.C. § 1151. This Court should grant the Petition to correct the Second Circuit's tortured reading of the 1788 Treaty of Fort Schuyler and its refusal to follow *Venetie*.

### B. The Properties Were Never Under Federal Superintendence

Independent of the set aside requirement, the

Properties are not now and never were under federal superintendence, which is an independent reason why they are not Indian Country. *Venetie*, 522 U.S. at 533. The Second Circuit essentially rejected that aspect of *Venetie*, and held that there was no requirement of proof that "reservation" land is federally superintended to be Indian Country. The Petition should be granted to correct that error.

The level of federal superintendence over Indian land required for Indian Country status is that the federal government "actively controls the lands in question, effectively acting as a guardian for the Indians." *Id.* In other words, the land must be "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians." *Id.*

Tested by that standard, the Properties are not federally superintended. The federal government never actively controlled the Properties. The federal government never exercised jurisdiction over the Properties, as guardian and protector of Oneida Indian Nation.[6] The Oneida Indian Nation purchased the Properties in fee simple and has since opened businesses on the acquired land. Services for the Properties are provided by Sherrill and not by the federal government. Moreover, the Properties are not part of the 32 acres of land in Madison County recognized by the Bureau of Indian Affairs as under the jurisdiction of the federal government. In such circumstances, the federal government does not superintend the Properties. *United States v. Roberts*,

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6 Indeed, the legislative history to 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) indicates that the federal Indian Bureau believed, at the time this act was passed, that the Indians of New York "are in no further need of governmental supervision or control." H.R. REP. NO. 81-2720, at 2 (1949).



185 F.3d 1125, 1130-31 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) (land was under federal superintendence only because the United States retained title to the property; the state considered the property to be beyond its taxing jurisdiction; the BIA Area Director approved the land acquisition; the government oversaw the property; and the BIA treated the property as trust land); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1253 (10th Cir. 2000) (land was under federal superintendence because the BIA treated the land in the same manner as lands within the tribe's formal reservation).

The Second Circuit's conclusion that the Properties are Indian Country simply because they are within the historical Oneida Indian reservation is incorrect. The court reached that conclusion by finding that the federal set aside and superintendence requirements are inapplicable where the land in question is a formal reservation. 337 F.3d at 155 ("While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision."). That holding incorrectly (i) presumes the existence of federal set aside; (ii) ignores *Venetie*; (iii) eviscerates the requirements of proof of federal set aside and superintendence for all three prongs of 18 U.S.C. § 1151; and (iv) is based upon the incorrect finding that the federal government established the reservation for the Oneidas in New York State through the 1794 Treaty of Canandaigua. That distortion of this Court's precedents and governing treaties must not be permitted. This Court should grant the Petition and reverse the decision below.

## II. THE 1838 TREATY OF BUFFALO CREEK DISESTABLISHED ANY ONEIDA NEW YORK RESERVATION

The 1838 Treaty of Buffalo Creek, 7 Stat. 550,

required the New York Oneidas to abandon any reservation in the State of New York. Thus, the Treaty of Buffalo Creek, subsequent case law, the removal policy of the United States government at the time the treaty was signed and other circumstances shows that the Oneidas' New York reservation was disestablished as a matter of law.

In Article 1 of the Treaty, the New York Oneidas and other tribes accepted a tract of land in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York . . ." The Oneidas also agreed that the Kansas land was to be their "future home" and "agree[d] to remove to their new homes . . . as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.*, Arts. 2, 13. Thus, Congress intended, and the Oneidas agreed, to remove from New York and Wisconsin to Kansas permanently.

Equally clear is the fact that the Kansas lands were in exchange for the Oneidas' removal from the eastern lands, including lands in New York. Nowhere in the jurisprudence or commentary is it even suggested that the 1838 Treaty of Buffalo Creek was intended to create a Kansas reservation for the Oneidas <u>in addition</u> to a 300,000-acre parcel in New York.

Any doubt that the 1838 Treaty of Buffalo Creek disestablished the Oneidas' New York reservation was put to rest by this Court when, in the late nineteenth century, Indian tribes including the New York Oneidas successfully sued the federal government for the value of the Kansas lands that were set apart for them in the treaty, but later sold by the federal government after the tribes refused to remove to them.

While it might be reasonably contended that [the



> Indians'] failure to remove should result in a cancellation of the [Treaty of Buffalo Creek], and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain.

*New York Indians v. United States*, 170 U.S. 1, 19 (1898).

Significantly, although the language of this Court's decision was limited to the Wisconsin reservation, the judgment was not so limited. The New York, Wisconsin and Thames Oneidas all shared in a nearly $2 million recovery flowing from the sale of the Kansas lands. *See id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases"). The New York Oneidas shared in that recovery because they held title to the Kansas lands granted to them by the 1838 Treaty of Buffalo Creek. That grant was not a gift. Rather, it was made in consideration of the Oneidas' agreement to move from and disestablish their New York and other eastern homes. Thus, the New York Oneidas sought and received the benefit of the 1838 Treaty of Buffalo Creek, *albeit* not the benefit they initially bargained for. The Court of Appeals, however, permitted the Oneidas to undo the bargain, while retaining the benefit, *i.e.*, the proceeds of the civil judgment.

Compounding its error, the Second Circuit required the presence of specific cession language to make a finding of reservation disestablishment. 337 F.3d at 158. To the contrary, this Court has made clear that what is required is that the "'congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'"

*DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 444 (1975) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).

The face of the Treaty of Buffalo Creek, as well as the legislative history and surrounding circumstances, make clear that Congress intended to disestablish the Oneidas' New York reservation. First, Article 2 of the Treaty explicitly refers to the Indian Removal Act of 1830, the purpose of which was to "[m]ake a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

Second, the legislative history of other congressional acts supports the view that Congress intended to disestablish the Oneidas' New York reservation. For example, the legislative history of 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) states that the "Oneida . . . Indians have no reservation" in New York State, H.R. REP. NO. 81-2720, at 2 (1949). Thus, consistent with the 1838 Treaty of Buffalo Creek and the decisions in the *New York Indians* cases, Congress (over one hundred years after the 1838 Treaty of Buffalo Creek was ratified) continued to express the view that the Oneidas' New York reservation was no more. This amply satisfies this Court's requirement that the congressional determination to terminate be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.

Third, as explained above, in the *New York Indians* cases, this Court held that title to the Kansas lands passed to the Oneidas at the time the Treaty of Buffalo Creek was made, and that the Indians' failure to assert title did not work a forfeiture of the title. *New York Indians*, 170 U.S. at 34.



Surely, Congress did not intend to pass title to land in Kansas to the Oneidas, while at the same time allowing a 300,000-acre reservation in New York to continue to exist. As a result, the *New York Indians* cases cannot be reconciled with the continuation of a New York reservation for the Oneidas.

Finally, the circumstances surrounding the Properties mandate a finding that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation. Although the "most probative" evidence of diminishment (or disestablishment) is statutory language, this Court also considers "the subsequent treatment of the area in question and the pattern of settlement there." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 330 (1998) (citing *Hagen v. Utah*, 510 U.S. 399 (1994)). The City of Sherrill is predominantly populated by non-Indians. In fact, the record below established that only .3% (three-tenths of one percent) of Sherrill's population is American Indian, Eskimo, or Aleut. Furthermore, New York State, and later the City of Sherrill, have exercised jurisdiction over this land from the time of the Properties' transfer from the Oneida Indians to non-Indians.

Therefore, it is beyond legitimate dispute that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation in New York.[7] This Court should grant the Petition to correct the Second Circuit's decision to the contrary.

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[7] At the very least, expert evidence was required to further elucidate the purpose of the 1838 Treaty of Buffalo Creek. That is yet another reason why summary judgment for the Oneida Indian Nation was improper and must be reversed.

## III. INDIAN COUNTRY STATUS AND NON-INTERCOURSE ACT PROTECTION CEASE WHEN A TRIBE NO LONGER EXISTS

A final reason why the Petition should be granted is that the Second Circuit, in conflict with the decisions of other Courts of Appeals, improperly extended the scope of the Non-Intercourse Act, 25 U.S.C. § 177. The Non-Intercourse Acts protects Indian Country. Indian Country covers, at most, reservation, dependent communities and allotments of Indian tribes. 18 U.S.C. § 1151. Once an Indian Tribe no longer exists, the protections of the Non-Intercourse Act for the tribe cease and Indian Country status for the tribe's lands ceases. To restore Indian Country status if the tribe or a successor thereafter comes back into existence, an application must be made under the Indian Reorganization Act. The Second Circuit's holding to the contrary improperly expands the scope of the Non-Intercourse Act.

The Court of Appeals held that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F.3d at 165. That is illogical, circular and incorrect. Rather, the Oneida Indian Nation has no rights under the Non-Intercourse Act, 25 U.S.C. § 177, and no claim to historical reservation status for the Properties, unless the Oneida Indian Nation has been in continuous tribal existence since the Properties became subject to the Act. *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*"); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987) (tribe may recover only if it shows that it was in continuous tribal existence and did not abandon tribal status from the time the land was alienated until the time of suit); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 & n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979).



The fact that Oneida Indian Nation is presently a federally recognized tribe is irrelevant to the protected status of lands it owns. "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Non-Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still turn to the district court for an ultimate judicial determination of its claim under the Non-Intercourse Act." *Id.* at 58.

The Second Circuit's logical fallacy is as follows: If there was a lapse in the Oneida Indian Nation's tribal status, Non-Intercourse Act coverage and Indian Country status both terminate at that moment in time. No other result is possible: How can land be Indian Country if the tribe that previously owned or used it has ceased to exist? How can land be owned by an Indian tribe or Indian nation if the tribe or nation has ceased to exist?

Once Indian Country status ends, or once the protection of the Non-Intercourse Act ceases, the land is then freely alienable, subject to state and local taxation; repurchase by the tribe does not create an exemption to taxation unless the lands are restored to trust protection under § 465 of the Indian Reorganization Act. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

As Judge Van Graafeiland observed in dissent below, "authoritative sources" have explained the significance of tribal discontinuity on aboriginal rights.

- "Since original Indian title is dependent upon proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe

constitutes a defense to the aboriginal claim." Felix S. Cohen, *Federal Indian Law*, Ch. 9, Sec. A2a (1982 ed.).

• "The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy . . . The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *United States v. Cook*, 86 U.S. 591, 593 (1873).

• "We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917).

• "To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that ... the trust relationship between the United States and the tribe has not been terminated *or abandoned*." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir.1994) (emphasis added).

• "Certainly individual Indians or portions of tribes may choose to give up tribal status.... If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979).

• "By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set



> apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir. 1932).

*Id.* at 171-72.

The record below contained substantial evidence that the New York Oneidas ceased to exist for a substantial period of time:

> • 1877: "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).
>
> • 1891: "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.*
>
> • The 1892 Census map of New York depicts no Oneida reservation.

• 1893: "The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." *1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.*

• 1900: "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." *1900 Annual Reports of the Department of the Interior.*

• 1901: "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections.... At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." *1901 Annual Reports of the Department of the Interior.*

• 1906: "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have "squatted" on the Onondaga Reserve: so many of these have



intermarried with the Onondaga as to preclude any probability of their removal.... About 120 of them are carried on the agency rolls as "Oneidas at Oneida" which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." *1906 Annual Reports of the Department of the Interior.*

The non-existence of the New York Oneidas as a tribe persisted into the mid-twentieth century. For example, the record below also showed that in 1925, an Assistant Commission of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

Accordingly, the Second Circuit misinterpreted the scope of the Non-Intercourse Act, and wrongly affirmed the grant of summary judgment for the Oneida Indian Nation. The Petition should be granted to correct that error.

## CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

December 10, 2003 Respectfully submitted,

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## APPENDIX

**OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 21, 2003**

United States Court of Appeals,
Second Circuit.

ONEIDA INDIAN NATION OF NEW YORK, Plaintiff-Counter-Defendant-Appellee,
Ray Halbritter, Keller George, Chuck Fougnier, Marilyn John, Clint Hill, Dale
Rood, Dick Lynch, Ken Phillips, Beulah Green, Ruth Burr, Brian Patterson, and
Iva Rodgers, Consolidated-Defendants-Appellees,

v.

CITY OF SHERRILL, NEW YORK, Defendant-Counter-Claimant-Appellant,
Madison County, Amicus Curiae-Appellant,
Oneida County, Amicus Curiae,
State of New York, Amicus Curiae.

Docket Nos. 01-7795, 01-7797.

Argued: May 13, 2002.
Decided: July 21, 2003.

Before: VAN GRAAFEILAND, MESKILL, and B.D. PARKER, Jr., Circuit Judges.

Judge VAN GRAAFEILAND dissents in part in a separate opinion.

B.D. PARKER, Jr., Circuit Judge.

This case, consisting of four actions, addresses whether properties reacquired by the Oneida Indian Nation of New York ("OIN" or "the Oneidas") are subject to taxation by the City of Sherrill, New York and Madison County, New York. The OIN is a federally recognized Indian tribe, governed by a Nation Representative and a Tribal Council.[1] The Oneidas lived on what became central New York State long before the founding of the United States. In the late eighteenth century most of the Oneidas' ancestral land was formally set aside by Congress as reservation land. During the nineteenth century much of it was sold to non-members of the tribe. But starting in the 1990s members of the tribe reacquired parcels in open-market transactions, and in 1997 and 1998 the purchases included several businesses and properties in Sherrill.[2] These properties include two upon which the Oneidas operate a gasoline station, a convenience store, and a textile manufacturing and distribution facility (the "Sherrill Properties" or the "properties"). Contending that these properties are within their reservation and are, consequently, not subject to taxation, the Oneidas refused to pay the property taxes or to collect sales taxes on merchandise sold at the businesses.

Following this refusal, Sherrill purchased three of the properties at tax sales and, two years later, recorded deeds. Sherrill also started formal eviction proceedings. In

[1] Despite our use of the "OIN" acronym, the Oneida Indian Nation of New York should not be confused with the original Oneida Indian Nation, which is not a federally recognized tribe and is not a party to these consolidated cases. As discussed infra, the original Oneida Indian Nation became divided into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Canadian Oneidas, by the middle of the nineteenth century.

[2] Located in Oneida County, Sherrill is the State's smallest city, occupying one-and-one-half square miles with a population of approximately 3000 and an annual budget of $2.4 million.



response, the Oneidas sued Sherrill in the United States District Court for the Northern District of New York (the "Lead case"), contending that the land, as part of their historic reservation recognized principally by the 1794 Treaty of Canandaigua, is exempt from state and municipal taxation. The suit sought declaratory and injunctive relief prohibiting the evictions and the imposition of property taxes. Although the Sherrill Properties were purchased from non-Oneidas, the Oneidas claim that their purchases reestablished the properties as reservation land because the federal government--which alone has the power to do so--has never changed the reservation status of the land.[3] Sherrill counterclaimed, seeking declaratory and injunctive relief and damages, asserting that, for a variety of reasons, the land had lost its reservation status and that the OIN has been unjustly enriched by municipal benefits received, but not paid for, after reacquisition.

Sherrill also petitioned the New York State Supreme Court, Oneida County, to order the eviction of the OIN from the properties (the "Eviction case"). The OIN, citing federal preemption, removed to federal court, contending that sovereign immunity barred Sherrill's claims. In response to this defense, Sherrill filed an action against the individual members of the Tribal Council (the "Members case"). Sherrill again sought eviction and also sought injunctive relief, forbidding council members from purchasing additional properties in the city.

These three cases were related to an additional action (the "Related case"), brought by the OIN against Madison County, concerning thirteen parcels of land also purchased by the OIN in the 1990s. As in the Lead case, the Oneidas

[3] It appears that the Sherrill Properties were transferred to an individual OIN member in 1805 and by that member to a non-Indian in 1807, and were thereafter owned by several private parties until their reacquisition.

sought declaratory relief that these properties are not subject to taxation, contending that, notwithstanding intervening non-Indian possession, these properties have remained reservation land.

Procedural strife followed. In the Lead case, Sherrill moved for summary judgment, for injunctive relief, and to amend its answer to add various affirmative defenses. The OIN opposed the motions and cross-moved for summary judgment in the Lead and Eviction cases, asserting principally that the parcels in question were non-taxable because they were located on reservation land in Indian country. *See* 18 U.S.C. § 1151. In the Members case, the OIN officers moved to stay or, in the alternative, to dismiss principally on grounds of sovereign immunity and the failure to name the OIN as a party. Madison moved to dismiss the Related case for failure to join two allegedly indispensable parties: the Wisconsin and Thames Oneidas. In November 2000, the State of New York, Madison and Oneida Counties, and a public company, Oneida Ltd., filed briefs as *amici curiae* in the Lead case in support of Sherrill's motion for summary judgment and in opposition to the OIN's cross- motion.

After the dust settled, the District Court issued a well-reasoned opinion resolving these various motions. *Oneida v. City of Sherrill*, 145 F.Supp.2d 226 (N.D.N.Y.2001) ("*Oneida IV*"). It considered a number of issues but devoted a good deal of attention to what the parties considered--and what we agree--to be the basic question posed: whether the properties are in Indian country. *Oneida IV*, 145 F.Supp.2d at 241. The court concluded that, for a number of reasons, they are. The properties are part of the Oneidas' aboriginal lands and federally recognized reservation. The reservation's status was guaranteed by treaty obligations--principally in the 1794 Treaty of Canandaigua--and Sherrill did not carry its burden of demonstrating congressional action disestablishing the reservation. Accordingly, the District Court concluded



that, as they are in Indian country, neither the Sherrill nor Madison Properties are taxable by Sherrill and Madison County, and granted the OIN judgment on its claims in the Lead case. *Id.* at 254-259.

Determining that the OIN was entitled to sovereign immunity, the court also granted judgment on Sherrill's counterclaims in the Lead case and denied Sherrill leave to amend its complaint. *Id.* at 258-59. The court granted the OIN judgment in the Eviction case as well, concluding that it was entitled to sovereign immunity. It also granted the council members' motion to dismiss in the Members case, concluding that they too were entitled to sovereign immunity and that, in any event, Sherrill had failed to join the OIN, which the court found to be an indispensable party. Finally, the court *sua sponte* granted the OIN judgment on the pleadings in the Related case, concluding that its findings with respect to the Sherrill Properties applied also to those located in Madison. Separately, the court denied Madison County's motion to dismiss that case. *Oneida Indian Nation of N.Y. v. Madison County*, 145 F.Supp.2d 268, 270-71 (N.D.N.Y.2001). Sherrill and Madison appealed.[4] We agree with the District Court's principal conclusion that the OIN's Sherrill Properties are not taxable, and therefore affirm the judgment in the Lead, Eviction, and Members cases. Because we find, however, that the court's *sua sponte* grant of judgment on the pleadings in the Related case was procedurally improper, we vacate this judgment and remand for further proceedings.

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[4] Sherrill appeals from the three separate judgments entered by the District Court on June 4, 2001, in the Lead, Eviction and Members Case, considered under docket number 01-7795. Madison appeals from the District Court's entry of judgment in the Related case, as well as the court's order denying its motion to dismiss, considered under docket number 01-7797. On appeal, Madison, Oneida County, and the State of New York have appeared as amici curiae on the Lead, Eviction, and Members cases. They will be referred to collectively as the "amici."

## BACKGROUND

### I. Treaties Governing Rights to the OIN's Land

Since the land in question has been the subject of federal litigation off and on for more than one hundred and fifty years, before looking at the controlling legal issues, we briefly review how we reached this point in time. As previously noted, the parties contest whether land first occupied by the Oneidas in upstate New York before the founding of this country is, upon reacquisition by the Oneidas, subject to taxation by New York State and its municipalities.

The Oneidas are the direct descendants of members of the original Oneida Indian Nation, one of the six nations of the Iroquois Confederacy (the "Six Nations"), which were the most powerful Indian tribes in the northeastern United States at the time of the American Revolution. *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 230, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) ("*Oneida II*") (citing B. Graymont, *The Iroquois in the American Revolution* (1972)). The Six Nations are the Cayugas, Mohawks, Oneidas, Onondagas, Senecas, and Tuscaroras. *New York Indians*, 170 U.S. 1, 36, 18 S.Ct. 531, 42 L.Ed. 927 (1898) ("*New York Indians II*"). From time immemorial through the Revolutionary period, the Oneidas inhabited what is now central New York State. Their aboriginal lands covered approximately six million acres, from the Pennsylvania border to the St. Lawrence River, and from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. *Oneida II*, 470 U.S. at 230, 105 S.Ct. 1245.

#### A. Nonintercourse Act and Canandaigua Treaty

With the adoption of the Constitution, Indian relations came exclusively under federal authority. *See Oneida II*, 470 U.S.



at 234, 105 S.Ct. 1245; *Oneida Indian Nation of N.Y. v. New York*, 194 F.Supp.2d 104, 146 (N.D.N.Y.2002) (*Oneida IIIb*) ("[A]ny rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution."). Article I, section 8, clause 3 of the Constitution, the Indian Commerce Clause, established Congress's power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3.

In 1790, Congress passed the first Indian Trade and Intercourse Act (the "Nonintercourse Act"), 1 Stat. 137, sharply limiting the alienability of Indian land. In essence, the Nonintercourse Act required federal consent for all land purchases from Indian nations. The 1793 amendments to the Act, which contain the language currently in effect, provided:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Act of March 1, 1793, 1 Stat. 329 (1793) (codified at 25 U.S.C. § 177 (2000)); *see generally Mohegan Tribe v. Connecticut*, 638 F.2d 612, 616-18 (2d Cir.1980) (discussing history of and amendments to Nonintercourse Act).

The Supreme Court has consistently applied the principle, embodied in the Nonintercourse Act, that federal consent is required for purchases of Indian land or for the termination of aboriginal title. *See, e.g., Oneida II*, 470 U.S. at 232, 105 S.Ct. 1245; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 62 S.Ct. 248, 86 L.Ed. 260 (1941) ("Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of

occupancy, which could only be interfered with or determined by the United States.") (citing, among other authorities, *Johnson v. McIntosh*, 8 Wheat. 543, 5 L.Ed. 681 (1823) (refusing to recognize land titles originating in grants by Indians to private parties in 1773 and 1775 because they were contrary to principle that Indian title could only be extinguished by or with consent of federal government)). The absence of federal consent is the Oneidas' central argument in this litigation.

Another pivotal enactment was the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794). This treaty recognized that the Oneida reservation covered approximately 300,000 acres,[5] and the federal government undertook that it "[would] never claim [this land], nor disturb [the Oneidas] ... in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. 45. On the strength of this treaty, which remains in force, the Oneidas contend that the land in Madison and Sherrill is reservation land in Indian country and, upon reacquisition, must be treated as such.

**B. Indian Removal and the Treaty of Buffalo Creek**

Notwithstanding the Nonintercourse Act's prohibition on purchases of Indian land, and despite federal government

[5] Prior to 1794, the Oneidas ceded substantial portions of their aboriginal lands to New York State. In 1785, by the Treaty of Fort Herkimer, the Oneidas ceded approximately 300,000 acres to New York State. *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1148 (2d Cir.1988). In 1788, by the Treaty of Fort Schuyler, the Oneidas ceded approximately 5 million more acres to the State and retained 300,000 acres as a reservation. *Oneida II*, 470 U.S. at 231, 105 S.Ct. 1245, *Oneida IIIb*, 194 F.Supp.2d at 112. The Sherrill Properties and, it appears, the Madison properties, were part of the territory reserved to the Oneidas. *Oneida IV*, 145 F.Supp.2d at 234.



advice to the contrary,[6] New York State repeatedly purchased Indian land within its borders. In a 1795 transaction, for instance, the OIN conveyed virtually all of its remaining land to New York in exchange for annual cash payments. *Oneida II*, 470 U.S. at 232, 105 S.Ct. 1245. Overall, more than thirty treaties of purchase were made with various segments of the tribe during the late eighteenth and early nineteenth centuries. *See* Jack Campisi, *Oneida, in 15 Handbook of North American Indians* 484 (Bruce G. Trigger ed., 1978) (hereinafter "Campisi"). The Madison properties purportedly were conveyed to the State in this manner. As Oneida lands were transferred to the State, they were surveyed and laid out in townships, which eventually were subdivided and sold to private parties. Individual Oneidas also sold land to private parties. The Sherrill Properties fall into this group of conveyances. The Oneidas contend that to the extent any of the purchases lacked congressional approval, they violated the Nonintercourse Act and the Treaty of Canandaigua.

Early in the nineteenth century, federal policy concerning eastern Indians changed from maintenance of their right of occupancy in ancestral lands to their removal west of the Mississippi River. This change was spurred by the states' desire to control the remaining unceded Indian land within their boundaries, by the incursion of settlers onto treaty-protected Indian land, and by the perceived inability of the Indians to assimilate. *See* David H. Getches et al., *Cases and Materials on Federal Indian Law* 93-95 (4th ed.1994)

[6] Colonel Timothy Pickering, the United States Secretary of War following the Treaty of Canandaigua, upon the recommendation of the United States Attorney General, ordered the Superintendent of the Affairs of the Six Nations not to aid New York in any purchases of Indian land and forwarded to New York Governor George Clinton a copy of the Attorney General's opinion that title to the Six Nations' land could be extinguished only by a treaty entered into under authority of the United States. See Seneca Nation of Indians v. New York, 206 F.Supp.2d 448, 494 (W.D.N.Y.2002).

(hereinafter "Getches"); Felix S. Cohen, *Handbook of Federal Indian Law* 53-54 (1942) (hereinafter "Cohen"). Removal was deemed necessary to "mak[e] available for white settlement a vast area and solving the problem of conflict of authority caused by a presence of Indian nations within state boundaries." Cohen at 53.

Between 1810 and 1816, the Six Nations, facing pressure from New York State to remove,[7] purchased approximately 500,000 acres in Wisconsin from the Menominee and Winnebago tribes.[8] *New York Indians II*, 170 U.S. at 11-14, 18 S.Ct. 531. Several hundred Oneidas moved there during the 1820s, with only a small number remaining in New York. *Id.* at 14, 36, 18 S.Ct. 531; *United States v. Boylan*, 265 F. 165, 167 (2d Cir.1920); Campisi at 485. Those who stayed "held a single and undivided tract reserved out of the original Oneida reservation." *Boylan*, 265 F. at 167.

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[7] Ogden Land Company, which held preemption rights to Indian lands in New York State, wished to free the remaining reservation land in the State from Indian title. Eleazar Williams, an Episcopal lay reader and catechist who had moved to the Oneida reservation, persuaded a large group of Oneidas and members of other tribes to emigrate and assisted in making the arrangements for their removal with the Wisconsin tribes. Francis Paul Prucha, *American Indian Treaties* 96, 202 (1997) (hereinafter "Prucha"); Campisi at 485. Williams' motive, however, differed from that of the State and Ogden; he sought the "establishment of an Iroquois ecclesiastical empire with himself as its leader ... resettled in the vastness of Wisconsin." Campisi at 485.

[8] The purchase was made on behalf of the Six Nations (excluding the Mohawks, who had withdrawn to Canada) and the St. Regis, Stockbridge, and Munsee tribes. The terms of this purchase and another made in 1822 were memorialized in a treaty between the federal government and the Menominee in 1831, to which the New York Indians gave their assent in 1832. *See New York Indians II*, 170 U.S. at 14, 18 S.Ct. 531; Treaty of Buffalo Creek, 7 Stat. 550, Preamble (1838) (proclaimed April 4, 1840).



In 1830, Congress passed the Indian Removal Act, which reflected this shift in federal policy and allowed Indians to exchange their eastern lands for lands set aside in the west.[9] *See* Act of May 28, 1830, 4 Stat. 411. The Act provided:

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there . . .

Ch. 148, 4 Stat. at 411-12

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[9] The impetus for the Removal Act was a conflict between Georgia and its Cherokee Indian inhabitants. Georgia, desiring complete jurisdiction over the lands within its territory, had signed a compact with the federal government in 1802 by which the state relinquished its western lands (which ultimately became the states of Mississippi and Alabama) in return for a promise by the United States to extinguish Cherokee Indian title to Georgia lands "as early as the same can be peaceably obtained on reasonable terms." Prucha at 156. When the federal government failed to live up to its part of the bargain, Georgia itself denied the Indians' title and jurisdiction over the lands in question and considered the treaties it had signed with the Indians--which recognized Indian title and political autonomy--invalid. *Id.* at 157. These actions led to significant objections by the northern states. After heated debates in Congress concerning Indian rights, in particular the relative sanctity of their treaty-making power, the Indian Removal Act was passed, and the Cherokees' removal from Georgia was complete by 1838. *Id.* at 161-65.

The 1838 Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), was enacted pursuant to this removal policy. Prucha at 202. Stimulated by the desire of Buffalo city leaders to "make room for the expansion of the city onto adjacent Seneca reservation lands," New York began a "full-scale drive ... to eliminate the Indians from the state and move them to lands west of Missouri." *Id.* Under the Treaty, the Six Nations and the St. Regis Indians agreed to remove from their New York and Wisconsin reservation lands to approximately 1.8 million acres in Kansas, which had been set aside as Indian territory. The Treaty provided that the new reservation lands were to provide "a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes." Buffalo Creek Treaty, art. 2. The Treaty authorized a payment of $400,000 to cover the costs of removal. As discussed below, Sherrill and Madison claim that it effected the disestablishment of the Oneidas' reservation and the formal relinquishment, with congressional approval, of their possessory claim to the lands at issue.

The first eight articles and Article 15 of the Treaty set forth this basic bargain. *Id.*, arts. 1-8, 15. Articles 9 through 14 reflect specific agreements between the government and individual tribes. *Id.*, arts. 9-14. In Article 10, for example, the Senecas agreed to remove within five years to land in eastern Kansas, and the government approved the sale of their remaining New York land to two individuals, Thomas L. Ogden of the Ogden Land Company and Joseph Fellows. *Id.*, art. 10; *see New York Indians*, 72 U.S. (5 Wall.) 761, 767, 18 L.Ed. 708 (1867) ("*New York Indians I*"). The Tuscaroras made a similar removal commitment in Article 14, which also confirmed the sale of their New York land to Ogden and Fellows. Buffalo Creek Treaty, art. 14.



At the time of the Treaty, only approximately 5000 of the original 300,000 acres of Oneida reservation land remained in their hands, the rest having been sold to New York or to private parties. Around 620 Oneidas still resided in New York. Buffalo 150 Creek Treaty, Sch. A, Add. 29. Article 13 of the Treaty provided for the removal of these Oneidas, but only upon certain conditions:

> The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs in securing the Green Bay country, and the settlement of a portion thereof; *and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Government of the State of New York for the purchase of their lands at Oneida.*

Buffalo Creek Treaty, art. 13 (emphasis added).

The wholesale removal of the New York Indians to Kansas contemplated by the Treaty never occurred. *See New York Indians II*, 170 U.S. at 26-27, 18 S.Ct. 531 (noting that provision was only made for the "actual removal of more than about 260 individuals of the claimant tribes," and that none of the thirty two Indians who actually received Kansas allotments ever settled permanently there). For their part, the Oneidas residing in New York and Wisconsin refused to relocate to Kansas. *See New York Indians II*, 170 U.S. at 9-10, 18 S.Ct. 531. Hundreds of New York Oneidas moved instead to Wisconsin and to Ontario, Canada. By 1848 only approximately 200 Oneidas resided in New York. Campisi at 485. Thus, by the middle of the nineteenth century, three distinct bands of the tribe existed: the New York Oneidas, the Wisconsin Oneidas, and the Canadian ("Thames") Oneidas. *Oneida IV*, 145 F.Supp.2d at 235.

The record does not reflect any large block sales of reservation land to New York State by the Oneidas after 1842, when 1100 acres were conveyed. But as the exodus of members continued over the next half-century, reservation acreage inhabited by Oneidas shrank significantly, by some accounts to less than 100 acres. *See Boylan*, 265 F. at 165 (discussing action brought by federal government, on behalf of Oneidas, seeking ejectment of defendants from thirty- two acres of land, forming part of original Oneida reservation); Annual Report, Commissioner of Indian Affairs, 1890, 1893 (stating that the Oneida reservation contained only approximately 350 acres in 1890, and approximately 100 acres in 1893 when the tribe's New York branch itself numbered less than 200).

**II. Land Claims Involving the OIN**

Litigation involving the OIN and other New York Indians followed the Treaty of Buffalo Creek. Ogden and Fellows, who held fee title to Seneca lands under the Treaty, sued New York to void pre-removal tax assessments after the parcels had been sold to third parties because of the Senecas' nonpayment of state taxes. *New York Indians I*, 72 U.S. at 764-65. In 1867, the Supreme Court held that the taxation of the parcels was "premature and illegal" because it interfered with the Indians' possessory rights guaranteed by the federal government. "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possession, and are in under their original rights, and entitled to the undisturbed enjoyment of them." *Id.* at 770.

As noted, most of the Six Nations Indians did not remove to Kansas. The federal government disposed of the Wisconsin lands conveyed to it by the Indians, appropriated the unoccupied Kansas land and placed it in the public domain



for sale to settlers. *New York Indians II*, 170 U.S. at 4, 24, 18 S.Ct. 531. The New York Indians sued, claiming entitlement to the Kansas lands ceded to them under the Treaty, and seeking the value of the land sold and the money the government had agreed to pay on their removal. *Id.* at 1-2, 18 S.Ct. 531.

Eventually the case reached the Supreme Court, which held in 1898 that the Buffalo Creek Treaty effected a present grant of the Kansas lands to the Indians and that forfeiture of these lands could occur only through legislative action. Simply opening the land to settlement, as the federal government had done, was insufficient. Accordingly, the Court concluded that the New York Indians, including the Oneidas, were entitled to money damages. *Id.* at 25- 36, 18 S.Ct. 531.

Litigation involving the Oneidas' proprietary rights in their New York reservation lands began in the late nineteenth century. In 1885, some Oneidas conveyed reservation parcels to non-Indians but continued to live on the land. After the Indian occupants failed to meet mortgage obligations, the owner brought a foreclosure action and, following partition, the Indians were ejected. Reaffirming the principles embodied in the Nonintercourse Act, we held the ejectment improper because the original conveyance lacked the approval of the federal government: the "tribe could not sell, nor the individual members, for they have not an undivided interest in the tribal lands, nor alienable interest in any particular tract." *Boylan*, 265 F. at 174. We emphasized that "[a] transfer of the allotment to [non-Indians] is not simply a violation of the proprietary rights of the Indians; it violates the government rights of the United States." *Id.* at 173.

Many decades later, in 1970, the Oneidas sued Oneida and Madison Counties as a consequence of their occupation of an approximately 900-acre tract ceded by the OIN to New York in 1795. The Oneidas claimed that the occupation violated

the Nonintercourse Act and sought to recover the land's fair rental value for a two-year period in the 1960s. The case reached the Supreme Court, which again affirmed the Oneidas' aboriginal possessory rights, concluding that the Nonintercourse Act and certain treaty obligations prohibited termination of these rights without federal approval. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 675-78, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) ("*Oneida I*") (stating that the Oneidas had asserted "the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession").

On remand, the district court found the counties liable to the Oneidas, and we affirmed. *Oneida Indian Nation of N.Y. v. County of Oneida*, 719 F.2d 525 (2d Cir.1983). Hearing the case for a second time, the Supreme Court again affirmed, holding that the Oneidas could maintain a federal common law action based on the counties' allegedly illegal occupation of their lands and that the Nonintercourse Act did not preempt the tribe's claims. *Oneida II*, 470 U.S. at 236-40, 105 S.Ct. 1245. The watershed decisions in *Oneida I* and *Oneida II* established the OIN's right to challenge the deprivation of its historic title by the sales to New York in the late eighteenth and early nineteenth centuries.[10]

In 1974, the OIN and the Wisconsin Oneidas brought a similar suit against Oneida and Madison Counties, but of considerably greater scope. The Oneidas alleged that between

[10] The damages phase of this case has just recently concluded, more than thirty years after the case commenced, with the Oneidas receiving approximately $35,000 plus prejudgment interest from Oneida and Madison Counties. *See Oneida Indian Nation of N.Y. v. County of Oneida*, N.Y., 217 F.Supp.2d 292 (N.D.N.Y.2002).



1795 and 1846, pursuant to some thirty agreements, New York State illegally acquired approximately 250,000 acres of Oneida reservation land in violation of the Nonintercourse Act. *See Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.*, 199 F.R.D. 61, 66 & n. 3 (N.D.N.Y.2000) ("*Oneida IIIa*"). The case was inactive during the pendency of *Oneida I and II*. In 1998, the United States intervened and joined the Oneidas in moving to add as defendants approximately 20,000 private landowners whom the Oneidas claimed were either liable for money damages or should be ejected. In September 2000, the district court concluded, following *Oneida II*, that the Oneidas could sue state entities for damages based on the illegal occupation of their historic reservation land but that ejectment and money damages from the individual landowners was not available, and the court declined to permit their joinder. *See Oneida IIIa*, 199 F.R.D. at 79-94.

In 1978 and 1979, the Oneidas also challenged New York State's purchases of their aboriginal lands in 1785 and 1788, under the Treaties of Fort Herkimer and Fort Schuyler, as violations of the Articles of Confederation, the Treaty of Fort Stanwix, and the 1783 Proclamation. We concluded, however, that the State had the right to make such purchases during the confederal period and dismissed the action. *See Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir.1988).

The next major litigation to reach our court was this group of consolidated cases where, as we have seen, the District Court granted summary judgment to the OIN, determining that the Sherrill and Madison Properties remained reservation land immune from local taxation.

## DISCUSSION

We review the grant of a motion to dismiss or a motion for summary judgment de novo, drawing all reasonable inferences in favor of the nonmoving party. *See Chambers v. Time Warner*, 282 F.3d 147, 152 (2d Cir.2002); *Young v. County of Fulton*, 160 F.3d 899, 902 (2d Cir.1998). In reviewing a dismissal pursuant to Federal Rule of Civil Procedure 12(b)*(*6), we accept as true all material facts alleged in the complaint. *Chambers*, 282 F.3d at 152. "Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Id.* (citation and internal quotation marks omitted). We apply this same standard in reviewing a grant of judgment on the pleadings pursuant to Rule 12(c). *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir.1999). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

### I. Basic Principles

Three basic principles inform the disposition of this action. The first is the Indians' right of occupancy on tribal land, or "Indian country," which "may extend from generation to generation, and will cease only by dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption." *New York Indians I*, 72 U.S. at 771. The second, embodied by the Nonintercourse Act, is federal preeminence over the disposition of land in Indian country. Since "Congress alone has the right to say when the [United States'] guardianship over the Indians may cease," *Boylan*, 265 F. at 171, the sale or conveyance of reservation land can only be made with congressional sanction, that is, "by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (2000). The third is federal preemption, which prohibits states from imposing property taxes upon Indian



reservation land without congressional approval. *New York Indians I*, 72 U.S. at 771; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."); *cf. Boylan*, 265 F. at 170.

There is no material dispute that the Sherrill Properties were part of the Oneidas' aboriginal land and the tribe's reservation as recognized by the Treaty of Canandaigua. Sherrill contends, however, that because the properties are no longer within Indian country and the Oneidas no longer exist as a tribe, they are subject to taxation. We first address these contentions and then turn to the District Court's procedural rulings.

### II. Indian Country

In general, "Indian country" refers to the geographic area in which tribal and federal laws normally apply and state laws do not. Section 1151 of Title 18 of the United States Code, defining "Indian country," provides:

> The term "Indian country" ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000).[11]

Dependent Indian communities encompass any "area ... validly set apart for the use of the Indians as such, under the superintendence of the Government." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). Indian allotments are those parcels allocated to tribes, as opposed to those opened to settlers, under federal policies designed to accommodate the westward movement of settlers and to promote the integration of Indians into the wider society. *See generally Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106-07, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998) (discussing federal allotment policy). Under § 1151, "[o]nce a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership." Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 513 (1976).

As noted, land in Indian country, including reservation land, is not subject to state taxation absent express congressional authorization. "The treaties and laws of the United States

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[11] Although § 1151 is a criminal statute, it "generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 428 n. 2, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). It codified the Act of June 25, 1948, 62 Stat. 757, which was passed to correct jurisdictional conflicts arising from allotment policy and the subsequent restoration of surplus lands to tribal ownership in the Indian Reorganization Act. *Hagen v. Utah*, 510 U.S. 399, 425, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (Blackmun, J., dissenting). Its practical effect "was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993) (quotation omitted).



contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester v. Georgia*, 31 U.S. 515, 557, 6 Pet. 515, 8 L.Ed. 483 (1832); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("[T]he Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear."); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173-81, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945). It traces from the "doctrine of discovery," the law of Indian land tenure which the Supreme Court developed in the early nineteenth century to reflect European policy toward the Indians and to explain Indian sovereignty relative to colonial authority. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-74, 5 L.Ed. 681 (1823). The doctrine provided that the "discovering" European nations (and later the United States) held fee title to Indian aboriginal lands, subject to the Indians' right of occupancy and use. *Oneida II*, 470 U.S. at 234. As a result, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the discovering nation's sovereign. *Id.* As Chief Justice Marshall explained in *Johnson v. McIntosh*:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful

> occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

*Johnson*, 21 U.S. (8 Wheat.) at 574.

Generally speaking, nineteenth and twentieth century federal policy was consistent with this approach to Indian sovereignty, despite a notably inconsistent vision of the Indians' relationship to non-Indian citizens. While the tribes exercise inherent sovereign authority over their members and land located within state boundaries, they are nevertheless "domestic dependent nations" under federal protection. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 5 Pet. 1, 8 L.Ed. 25 (1831); *see also Boylan*, 265 F. at 172. The land they occupy is owned by the United States, which has retained the authority to regulate conveyances. As we have observed, "[w]hile the state[s] ha[ve] a right to make treaties with the Indians, [they] cannot interfere with the right [s] and obligations of the federal government." *Boylan*, 265 F. at 173. Although Indians' dependent status prohibits domestic and international political recognition, "it does assure them self-government, free of most state law strictures, over their territory and members, and, to a more limited extent, over non-Indians." Getches at 373-74; *see Boylan*, 265 F. at 174.

This "platonic notion[ ] of sovereignty," embodied in the so-called "Indian sovereignty doctrine," historically gave state law "no role to play" within a tribe's territorial boundaries. *McClanahan*, 411 U.S. 164, 168, 172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). While courts have moved towards reliance on firmer, more textually based concepts such as



federal preemption to definitively resolve the rights of Indian tribes vis-à-vis the states, see *id.*, the Indian sovereignty doctrine remains relevant because it provides a backdrop against which the applicable treaties and federal statutes must be read.

**A. Set Aside and Superintendence**

Sherrill contends that, even accepting the proposition that the properties are located within the Oneida reservation's historic boundaries, the parcels are taxable because they are not currently located within Indian country. Principally relying on *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998), Sherrill asserts that the properties are not in Indian country because they were neither set aside by the federal government for Indian use nor placed under federal superintendence. Rather, the properties were acquired in private, open-market transactions and receive services from Sherrill, not the federal government.

In *Alaska*, the Supreme Court considered whether certain nonreservation land owned by members of the Venetie tribe in fee simple was located in Indian country. *Id.* at 527, 118 S.Ct. 948. The land had been part of the Neets'aii Gwich'in reservation, which had been disestablished pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § § 1601 *et seq.* Title was then conveyed to the Venetie native corporations as tenants in common, which in turn transferred title to the tribe. *Id.* at 524, 118 S.Ct. 948. Because the reservation had been disestablished, and because no allotments were involved, "whether the Tribe's land is Indian country depend[ed] on whether it f[e]ll[ ] within the 'dependent Indian communities' prong of the statute, § 1151(b)." *Id.* at 527, 118 S.Ct. 948. The Court concluded that the land was not Indian country because it neither had been "set aside by the Federal Government for the use of the

Indians as Indian land" nor was "under federal superintendence"--two requirements, the Court found, that applied equally to reservations, dependencies, and allotments. *Id.* at 527, 532-34, 118 S.Ct. 948.

Sherrill argues that because the OIN, like the Venetie, purchased the properties in fee and can freely alienate them, the land cannot be in Indian country. We disagree. While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision. *See United States v. John*, 437 U.S. 634, 638-47, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (holding that tribe's fee simple parcels on historic reservation were under federal control despite the fact that federal supervision of the tribe had not been continuous); *cf. Donnelly v. United States*, 228 U.S. 243, 269, 33 S.Ct. 449, 57 L.Ed. 820 (1913) (holding that reservation land is Indian country).[12]

Because the Sherrill Properties are located on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua, they satisfy the set aside and superintendence requirements of 18 U.S.C. § 1151.[13]

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[12] The *Alaska* Court itself noted that it "had also held, not surprisingly, that Indian reservations were Indian country." 522 U.S. at 528 n. 3, 118 S.Ct. 948; *see also id.* at 528-30, 118 S.Ct. 948 (discussing cases where the Court had found "that Indian lands that were *not* reservations could be Indian country" (emphasis added)).

[13] Sherrill's argument that the Oneidas' land does not meet federal set aside requirements because it was originally allocated to the Indians by New York State, rather than the United States, is incorrect. The 300,000 acres were a carve-out from the 1788 Treaty of Fort Schuyler, and represented that portion of the Indians' aboriginal homeland that had not been conveyed to New York and thus never became state land. Oneida II, 470 U.S. at 231, 105 S.Ct. 1245, Oneida IIIb, 194 F.Supp 2d at 139



Moreover, just as *Alaska* concluded that the "mere provision" of federal services on the tribe's property did not make it Indian country, the provision of certain state services to the Oneidas by Sherrill does not eliminate that status. *See Alaska*, 522 U.S. at 534, 118 S.Ct. 948.

**B. Alienability**

Alternatively, Sherrill argues that the properties are not in Indian country because they are freely alienable. Relying on *Cass County*, Sherrill contends that the reacquisition of freely alienable, former reservation land by an Indian tribe "does not cause the land to resume tax- exempt status ... unless and until [it is] restored to federal trust protection under [25 U.S.C. § 465]."[14] Sherrill Br. at 35 (quoting *Cass County*, 524 U.S. at 115, 118 S.Ct. 1904). *Cass County*, however, offers Sherrill little help. There, Congress explicitly had made land in Indian country freely alienable by providing for the "complete cession and relinquishment" of all tribal title in Minnesota. *Cass County*, 524 U.S. at 108, 118 S.Ct. 1904.

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(noting that Article 2 of the treaty "specifically states that the Oneidas 'hold to themselves and their posterity forever' the 'reserved lands' "); id. at 140 (concluding that "the Treaty of Fort Schuyler cannot reasonably be understood to have divested the Oneidas of their aboriginal title"). After the federal government assumed complete control over Indian affairs with the ratification of the Constitution, the Canandaigua Treaty recognized the Oneidas' 300,000-acre reservation in federal terms, stating that it "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. 45.

[14] Section 465 of the 1934 Indian Reorganization Act allowed some of the land alienated under allotment to return to Indian hands. The section "grants the Secretary of the Interior authority to place land in trust, to be held by the federal government for the benefit of the Indians and to be exempt from state and local taxation after assuming such status." Cass County, 524 U.S. at 114, 118 S.Ct. 1904.

Afterwards, the land had been subject to federal allotment and sold to non-Indians. Because "alienability equals taxability," the Court found the land in question to be taxable. *Id.* at 109, 113, 118 S.Ct. 1904 (citing *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); *Goudy v. Meath*, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130 (1906)). In contrast, the Sherrill Properties are located on reservation land, a status which Congress has never changed. Since Congress has not done so, the properties did not become freely alienable and taxable simply because the OIN purchased them on the open market and currently holds them in fee simple. *See Solem v. Bartlett*, 465 U.S. 463, 471, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). State and local governments may not tax reservation land "[a]bsent cession of jurisdiction or other federal statutes permitting it." *County of Yakima*, 502 U.S. at 258, 112 S.Ct. 683. Sherrill can point to neither.

Sherrill is troubled by the seeming "impossibility" that the Oneidas' free- market purchase of land within their ancient ancestral homeland could instantly render the parcels free from taxation and by the potential hardship to local municipalities and residents resulting from the Oneidas' "recreat[ion]" of "a tribal homeland." Sherrill Br. at 37. It suggests that this result is inconsistent with the conclusion of other courts that, even when a reservation has not been disestablished, Indians who no longer own parcels on the reservation cannot base claims to possessory rights on the Nonintercourse Act. *Id.* at 32-34 (citing *Oneida IIIa*; *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999)).



But there is no inconsistency. The authorities Sherrill points to address the judicial remedies available for interference with the possessory rights of Indian plaintiffs, not the existence of those rights. In *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357-59, 47 S.Ct. 142, 71 L.Ed. 294 (1926), for example, the Supreme Court held that the proper remedy for the wrongful taking of Indian land that was subsequently settled and developed was monetary damages rather than repossession by the tribe. This principle became known as the "impossibility" doctrine because it was based on the impracticability of uprooting current property owners where Indians held a valid possessory claim to land on which others had settled.

Our case is different. Recognizing the Oneidas' possessory rights in their historic reservation land, and the accompanying exemption from state taxation, does not require uprooting current property owners, because the Oneidas currently own the properties in question. Consequently, the threat from eviction present in *Oneida IIIa* and *Cayuga* is not present here. And Sherrill's argument that the removal of property from local tax rolls is a "hardship" that "upsets settled expectations" only begs the question whether the city is authorized to tax the properties.

The critical dichotomy, which Sherrill does not acknowledge, is between historic Indian title and fee ownership of the land itself. Indian or aboriginal title is the right of a tribe to use and occupy lands it has inhabited from time immemorial. *See Oneida II*, 470 U.S. at 234, 105 S.Ct. 1245. When a reservation has been disestablished, as in *Alaska* or *Cass County*, Indian title is extinguished and the only pertinent inquiry for ownership purposes is fee title. But when Indian land has been alienated in ways inconsistent with federal law, Indian title remains with the tribe. The Indian-country status of the alienated land is irrelevant for tax purposes when non-Indians hold fee title, since they pay state taxes. But when

the tribe holding Indian title reacquires former reservation land, both forms of title coexist. *Cf. United States v. Sandoval*, 231 U.S. 28, 48, 34 S.Ct. 1, 58 L.Ed. 107 (1913) (rejecting position that Indian lands held in fee simple by Pueblo cannot be Indian country). The Indian-country status of the land therefore becomes fully relevant: the state cannot tax it and the tribe can no longer legally alienate it, at least without federal approval.

At first glance, this "coexistence" of titles appears uneasy, because the validity of the Oneidas' Indian title depends on a finding that the properties were alienated in violation of the Nonintercourse Act. And if this is so, then the chain of fee simple title, of which the Oneidas are now part, is inval*id*. This unease is ultimately unwarranted, however, because the OIN's possessory rights are grounded in its unextinguished Indian title, just as they were prior to the 1805 conveyance. Acquisition of the properties, as the tribe asserts, was the least disruptive means of effectuating these possessory rights. Because the previous fee owners relinquished any claims to the land, the OIN's rights may be fully realized. Accordingly, we conclude that the OIN's purchase of the Sherrill Properties in fee simple neither rendered them freely alienable nor deprived them of their Indian-country status.

**III. Effect of the Buffalo Creek Treaty on Oneida's Property Rights**

Both of Sherrill's arguments for why the properties are not in Indian country rest on the claim that the land is no longer in an Indian reservation. This claim is grounded in the 1838 Buffalo Creek Treaty which, Sherrill and the *amici* contend, formally disestablished the Oneida reservation. Again, we disagree. Before returning to the text of this treaty, it is helpful to note certain basic canons of Indian treaty construction.



**A. Canons of Indian Treaty Construction**

Treaties are generally more closely linked to the historical events surrounding their negotiation and passage than are private agreements. They are, accordingly, "construed more liberally ..., and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943). This is particularly true with regard to Indian treaties. "'The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians [with respect to tribal lands],' and the Indians' unequal bargaining power when agreements were negotiated." *Hagen*, 510 U.S. at 423 n. 1, 114 S.Ct. 958 (Blackmun, J. dissenting) (quoting *Oneida II*, 470 U.S. at 247, 105 S.Ct. 1245). This relationship, and the notions of Indian sovereignty and self- government embodied in it, "provide[ ] an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (quoting *McClanahan*, 411 U.S. at 172, 93 S.Ct. 1257 (1973)).

It is, moreover, "well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Oneida II*, 470 U.S. at 247, 105 S.Ct. 1245 (citations omitted). Any finding that Congress has abrogated Indian treaty rights is inappropriate "[a]bsent explicit statutory language." *Oneida II*, 470 U.S. at 247, 105 S.Ct. 1245 (citation and internal quotation marks omitted); *cf. Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985). Congress's intention in that regard, in other words,

must be "clearly expressed."[15] *Hagen*, 510 U.S. at 423 & n. 1, 114 S.Ct. 958 (Blackmun J., dissenting).

**B. Disestablishment and Diminishment Generally**

The Supreme Court applied and elaborated these canons in considering issues of reservation disestablishment and diminishment most recently in the "surplus land act" cases.[16] These cases dealt with land claims arising from the allotment era and specifically addressed whether certain unallotted lands opened for settlement to non-Indians remained in Indian country. *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), for example, involved a writ of habeas corpus sought by a non-Indian who had been tried and convicted in state court for a crime committed on a Sioux reservation. The question presented was whether the state had jurisdiction over the petitioner by virtue of the Cheyenne River Act, which had authorized the Interior Secretary to allot a portion of the reservation to homesteaders. In concluding that the reservation had not been diminished, the Court set forth the standard for identifying the "clear" expressions of congressional intent needed to find diminishment. It began by noting that

[15] This canon has been applied on numerous occasions to exempt tribes from state taxation. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); McClanahan, 411 U.S. at 174-75, 93 S.Ct. 1257 (1973); Squire v. Capoeman, 351 U.S. 1, 6-8, 76 S.Ct. 611, 100 L.Ed. 883 (1956); Carpenter v. Shaw, 280 U.S. 363, 366-67, 50 S.Ct. 121, 74 L.Ed. 478 (1930); Choate v. Trapp, 224 U.S. 665, 675-79, 32 S.Ct. 565, 56 L.Ed. 941 (1912); The Kansas Indians, 72 U.S. (5 Wall.) 737, 760, 18 L.Ed. 667 (1866).

[16] Beginning in the late-nineteenth century, Congress passed a series so-called "surplus land acts," forcing Indians onto individual allotments carved out of reservations and opening unalloted lands to non- Indian settlers.



> only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise .... Congress *[must] clearly evince an intent to change boundaries.*

*Id.* at 470, 104 S.Ct. 1161 (emphasis added) (citations and internal quotation marks omitted).

Although "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" can be helpfully probative, particularly when buttressed by fixed compensation for the opened lands, *id.*, this language is not a prerequisite for a finding of diminishment. Rather, an act's legislative history and the subsequent treatment of the land (including settlement patterns), may also suffice:

> When events surrounding the passage ...--particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress--unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged. To a lesser extent, we have also looked to events that occurred after the passage of a surplus land Act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the

> Bureau of Indian Affairs and local judicial authorities dealt with unalloted open lands. On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

*Solem*, 465 U.S. at 471-72, 104 S.Ct. 1161 (citations omitted); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) (stating that the Court may consider " 'the historical context surrounding the passage of the surplus land Acts,' and to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there" (quoting *Hagen*, 510 U.S. at 411, 114 S.Ct. 958)).

But when these elements, considered in their totality, "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472, 104 S.Ct. 1161. The same analysis applies to the termination or disestablishment of a reservation. *See DeCoteau v. Dist. County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) ("[The Supreme Court] does not lightly conclude that an Indian reservation has been terminated .... '[T]he Court



> requires that the congressional determination to terminate ... be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.' ") (quoting *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973)).

Applying these principles, the Supreme Court has found language supporting diminishment in cases where the operative portion of a surplus land act reflects an Indian agreement to "cede, sell, relinquish and convey" opened lands. *See, e.g., Yankton*, 522 U.S. at 344, 118 S.Ct. 789; *DeCoteau*, 420 U.S. at 439, 441 n. 22, 95 S.Ct. 1082; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 591 & n. 8, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). Similarly, in *Hagen v. Utah*, the operative language provided that "all the unallotted lands within said reservation *shall be restored to the public domain*," 510 U.S. at 412, 114 S.Ct. 958 (emphasis added), which the Court found indicated a congressional intent to diminish. *Id.* at 414, 114 S.Ct. 958.

In each of these cases, the Supreme Court found a textually grounded intention to diminish supported by legislative history. To varying degrees the Court also found other support such as contemporaneous congressional and administrative statements, proclamations opening the reservation to settlement, the state's assumption of jurisdiction over the opened lands, and the subsequent pattern of settlement. *See Yankton*, 522 U.S. at 351-57, 118 S.Ct. 789; *Hagen*, 510 U.S. at 416-21, 114 S.Ct. 958; *DeCoteau*, 420 U.S. at 437-49, 95 S.Ct. 1082; *Rosebud*, 430 U.S. at 592-615, 97 S.Ct. 1361.

**C. The Buffalo Creek Treaty**

As we have seen, Articles 1 and 2 of the Buffalo Creek Treaty summarize the central bargain between the New York Indians and the federal government: the cession of the New

York Indians' Wisconsin lands in exchange for reservation land in Kansas. Most of the remainder of the Treaty addresses the Kansas tract and various other tribe-specific arrangements. Articles 10 and 14 contain explicit cession language for the New York territory of two tribes, the Senecas and Tuscaroras. Buffalo Creek Treaty, arts. 10, 14; *see New York Indians II*, 170 U.S. at 21, 18 S.Ct. 531 (stating that the Senecas' and Tuscaroras' agreements "indicate[d] an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas"). In contrast, Article 13, which addresses the Oneidas, contains no such language:

> The United States will pay [certain sums to certain Oneidas] ... for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they *hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York* for the purchase of their lands at Oneida.

Buffalo Creek Treaty, art. 13 (emphases added).

Nothing in its text provides "substantial and compelling" evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation.[17] There is no specific cession language, and no fixed-sum payment for opened land

[17] Sherrill and the State rely upon Article 2 of the Treaty, asserting that the Oneidas agreed to the Kansas tract "as a permanent home for all the New York Indians, now residing in the State of New York." Buffalo Creek Treaty, Art. 2 (emphasis added). This provision, however, applies only to those Indians "who have no permanent homes." It is therefore not applicable to the OIN, who had a permanent residence in New York State. Even if it were applicable, the article does no more than Article 13 in revealing an intent by Congress or the Oneidas to disestablish their reservation in New York.



in New York; rather there is only the possibility of a sale for "uncertain future proceeds." *DeCoteau*, 420 U.S. at 448, 95 S.Ct. 1082 (describing arrangement in *Mattz*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92). Article 13 at best is ambiguous about whether removal to Kansas was required. More properly, it reflects a simple agreement to agree. While the Oneidas agreed to remove, removal was conditioned on speculative future arrangements between the Indians and a third party, New York's governor. *See New York Indians II*, 170 U.S. at 28, 18 S.Ct. 531 ("It ... appears, from the eleventh, twelfth, and thirteenth findings [of the Treaty], that the President never fixed any time for [the Indians'] removal, as was contemplated in the third article.") This contingency is reflected by the comments of Ransom Gillet, a federal Indian commissioner who participated in the Treaty negotiations and whose declaration is appended to the final document. Gillet stated that, in obtaining the Oneidas' consent to the treaty, he "most solemnly assure[d] them that the *treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York* .... The treaty gives them lands if they go to them and settle there but they need not go unless they wish to. When they wish to remove they can sell their lands to the Governor of the State of New York and then emigrate. But they will not be compelled to sell or remove."[18] Statement of Ransom H.

[18] Contrary to the contention of Sherrill and New York State, consideration of the Gillet declaration here is proper. See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). Senate amendments to the Buffalo Creek Treaty in June 1838 required a federal commissioner to explain its meaning to the tribes before it could take effect. Following Gillet's declaration to the Oneidas, the tribe assented to the treaty, and this assent--which refers to Gillet's declaration and includes his affirmation that the assent was voluntary--appear as addenda to the document as ratified. See New York Indians II, 170 U.S. at 24, 18 S.Ct. 531 ("[A] written declaration annexed to a treaty at the time of its ratification was as obligatory as if the provision had been

Gillet at Oneida Castle, Aug. 9, 1838 (emphasis added); *see also* Report of the Committee of Indian Affairs, State of New York, Mar. 24, 1847, at 4 (transcribing statement by a federal Indian commissioner to the Six Nations that they were not obligated to remove west). As it turned out, the sales to New York State were never accomplished, and the planned removal never took place. *Oneida IIIb*, 194 F.Supp.2d at 142.

Article 3 of the Treaty, moreover, contemplates that some tribes might not remove from their New York lands:

> [S]uch of the tribes of the New York Indians *as do not accept and agree to remove to the country set apart for their new homes* within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

Buffalo Creek Treaty, art. 3 (emphasis added); *see New York Indians II*, 170 U.S. at 28, 18 S.Ct. 531. Accordingly, the Treaty's text contains neither an obligation to remove nor any indication of a congressional intention to disestablish the Oneidas' New York reservation.

Sherrill and the *amici* nonetheless observe that certain legislative and administrative documents, such as "representative" reports of the Commissioner of Bureau of Indian Affairs spanning the period 1890 to 1997 and a 1981 Senate Report preceding the passage of New York's Indian jurisdictional statute, 25 U.S.C. § 233,[19] demonstrate that the

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inserted in the body of the treaty itself.") (citing Doe v. Braden, 57 U.S. (16 How.) 635, 656, 14 L.Ed. 1090 (1853)).

[19] This statute gives the courts of New York civil jurisdiction in actions "between Indians" or "between one or more Indians and any other person or persons." 25 U.S.C. § 233 (2000). Notably, it also provides that nothing in it "shall be construed as



Oneidas no longer have a New York reservation. While congressional and administrative references to the reservation may bear some general relevance to congressional intent, *see Yankton*, 522 U.S. at 351, 118 S.Ct. 789, the references cited by Sherrill, the earliest of which was decided a half-century after the Treaty's proclamation, indicate little if anything about Congress's intent in 1838. Given the absence of anything in the Buffalo Creek Treaty's text or legislative history supporting disestablishment, we conclude that these later documents do not "unequivocally reveal" the intention necessary to demonstrate disestablishment.[20] *Solem*, 465 U.S. at 471, 104 S.Ct. 1161

Moreover, two enactments in the wake of the Buffalo Creek Treaty weigh against disestablishment. Under an 1842 treaty between the Oneidas and New York, certain Indians who had not migrated to Wisconsin sold a portion of their New York land (amounting to some 1100 acres) to the State. This treaty provided for the conveyance of certain lots to the State and other lots to non- removing Indians to be held as "common property." *Boylan*, 265 F. at 168 (quoting Treaty of 1842,

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subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." Id.

[20] Most of these documents, in particular those published by the Department of the Interior and the Commissioner of Indian Affairs, appear to rely on one another. And one of them, the Department of the Interior's 1997 Annual Report on Indian land, acknowledges that thirty-two acres in Madison County is under the jurisdiction of the Bureau of Indian Affairs ("BIA"). This is, presumably, the same land we referred to as federally protected land in Boylan. 265 F. at 165-68.

Further, the fact that certain congressional documents and maps of the area, introduced by New York State on appeal, omit mention of an Oneida reservation in New York State does not conclusively indicate disestablishment. In fact, other relatively recent maps and documents, as the amici recognize, do reveal such a reservation.

arts. 1, 6). We later described this purchase as "such *portion of the reservation* as represented the equitable share in the proportion to the number of Indians who migrated." *Id.* at 167-68 (emphasis added). Finally, an 1843 enactment of the New York legislature, which sought to allow the Oneidas to hold their lands in severalty and (improperly) to alienate them by majority vote of the chiefs and head men of the tribe, makes explicit reference to "lands and property in the *Oneida reservation*." *Id.* at 169 (emphasis added) (quoting Act Relative to the Oneida Indians, Laws of the State of New York, 66th Sess., 244-46, Ch. 185, Sec. 1 (Apr. 8, 1843)).[21]

Sherrill and New York State also suggest that federal Indian removal policy, reflected in the Buffalo Creek Treaty, itself requires a finding that Congress intended to disestablish the reservation. In particular, the State argues that the "removal policy's goal of reducing conflicting state and tribal sovereignty could be accomplished only if Oneida sovereignty over the area from which the Nation was obligated to remove was terminated." New York Br. at 13. But this argument ignores both the requirement that removal language be "clearly expressed," as well as the text of the Removal Act, which permits the President to provide western lands to "such tribes or nations of Indians as may *choose* to exchange the lands where they now reside, and move there." 4 Stat. 411 (emphasis added). The State's argument also ignores the success of the Buffalo Creek Treaty in facilitating the removal of tribes other than the OIN. As the lower court found, the Treaty provided for the absolute cession of New York land for certain tribes, in particular the Senecas and Tuscaroras. The fact that certain parts of the Treaty provided for cession and other parts did not demonstrates that when

[21] Contrary to the suggestion of Madison and Oneida Counties, the fact that, under the 1843 law, individual Indians could hold the land in common, and could sell it to non-Indians under specified circumstances, does not reflect the disestablishment of the reservation.



Congress wished to disestablish a reservation, it knew what language to employ.

Sherrill and the *amici* next argue that the subsequent treatment of the reservation, in particular the pattern of its settlement and its jurisdictional history, reflects a congressional intention to disestablish. They point out that few Oneida Indians reside today in Madison and Oneida Counties, and they contend that the unabated reduction over time of the reservation's members and acreage supports *de facto* disestablishment.

At the time of the Buffalo Creek Treaty's proclamation, however, only 5000 of the original 300,000 acres remained under Oneida ownership, principally due to sales of land to the State. And, according to the *amici's* evidence, by far the largest influx of non-Indians to both Madison and Oneida Counties likewise occurred prior to 1840. Br. of *Amici Curiae* Madison County and Oneida County at 11 (table); *id.* at 2, 7 (stating that "[b]y the early nineteenth century, the area had lost its Indian character and had been settled and developed by non-Indians"). Not surprisingly, the most significant population changes occurred when the bulk of the land was alienated. *Id.* at 11. The fact that the Indian population and reservation acreage further decreased between 1840 and 1920 is not persuasive evidence that the Buffalo Creek Treaty was meant to disestablish the reservation.

In any event, subsequent settlement patterns are of limited use in demonstrating disestablishment. *Yankton Sioux*, 522 U.S. at 356, 118 S.Ct. 789 (finding demographic evidence the "least compelling" because "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation"); *Hagen*, 510 U.S. at 440-41, 114 S.Ct. 958 (Blackmun, J., dissenting) ("Absent

other plain and unambiguous evidence of a congressional intent, we never have relied upon contemporary demographic or jurisdictional considerations to find diminishment."). Because the Oneidas sold most of their land to the State or private parties well before the Buffalo Creek Treaty and the flood of non- Indians into the area is not clearly linked to the Treaty, the gradual reduction in the number of Oneidas living on their reservation does not reflect a clear congressional intent to disestablish it.

Finally, Sherrill contends that the continued existence of the Oneidas' reservation is incompatible with the damage award they received in *New York Indians II* as a consequence of the appropriation of their Kansas land. Recall that in *New York Indians II*, the Supreme Court found that the Buffalo Creek Treaty had effected a present grant of the Kansas lands to the OIN and that, because the land had been improperly appropriated and settled by non-Indians, the tribes were entitled to damages in the amount the government had received as the sale price. 170 U.S. at 19-21, 36, 18 S.Ct. 531. The fact that the OIN received a portion of the resulting $2 million award, Sherrill argues, evidences an "exchange" of the Oneidas' New York land for land in Kansas, which supports a finding of disestablishment.

The focus of the Buffalo Creek Treaty, however, was the exchange of *Wisconsin* land--not New York land--for that in Kansas. *See* Buffalo Creek Treaty, arts. 1, 2. The Supreme Court's decision in *New York Indians II*, as Sherrill acknowledges, reflects this bargain. *See* 170 U.S. at 2, 18 S.Ct. 531 (petition stated that "the claimants ceded and relinquished to the United States all their right, title, and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin"); *id.* at 19, 29, 18 S.Ct. 531 (discussing case in terms of the "seizure and sale of the Wisconsin lands"). The divestiture by the Senecas and Tuscaroras of their New York land, as the Court pointed out, indicated



those tribes' "intention ... that they should take immediate possession of the tracts set apart for them in Kansas." *Id.* at 21, 18 S.Ct. 531. The Court said nothing about such a divestiture by the Oneidas.

Sherrill contends that the damage award "logic[ally]" incorporates the unstated conclusion that the Oneidas' New York reservation had been disestablished. Sherrill Br. at 40. This argument, for which Sherrill has provided no authority, ignores what was decided in *New York Indians II*. The exchange of Wisconsin for Kansas lands under the Treaty *itself* was the rationale for the award; the fact that some of the Oneidas' land had not been conveyed to the government was irrelevant. The few thousand acres of New York reservation land at issue appear even less significant to the award when one considers that the Treaty included a 65,000-acre carve-out in Wisconsin so the Oneidas could maintain a reservation there. Buffalo Creek Treaty, art. 1.[22]

Construing the Buffalo Creek Treaty liberally and resolving, as we must, all ambiguities in the Oneidas' favor, we conclude that neither its text nor the circumstances surrounding its passage and implementation establish a clear congressional purpose to disestablish or diminish the OIN reservation.

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[22] The case against disestablishment is further supported by the text of Article 3, which preserves Indian title to the Kansas lands (by preventing forfeiture of such title) as long as the tribe has agreed to remove; there is no divestiture requirement or other exchange. The Supreme Court in New York Indians II pointed out that the Oneidas had met the condition to avoid forfeiture merely by their agreement to remove. 170 U.S. at 26, 18 S.Ct. 531. Contrary to the State's suggestion, the Oneidas' agreement to remove is distinguishable from an agreement to cede their reservation; the latter could have occurred as a result of the former, but it never did because the applicable conditions were not satisfied.

## IV. Continuous Tribal Existence

Sherrill further argues that there are, at a minimum, "disputed issues of fact" as to whether the OIN has maintained its tribal existence so as to be entitled to claim the properties as reservation land. It argues that the fact that the OIN is a currently recognized tribe is irrelevant, because as a practical matter it has not existed continuously over the last century. In support of this argument, Sherrill chronicles the gradual reduction in population of the OIN, pointing to statistics reflecting the non-Indian influx to Madison and Oneida Counties. Any lapse in tribal identity, Sherrill concludes, rendered the OIN's land freely alienable and precludes the tribe from asserting rights in its historic reservation land. Such a determination would, in turn, defeat the OIN's claims to tax exemption.

Sherrill's argument assumes that a tribe's land loses its reservation status in the event of a temporary lapse of tribal organization or identity. We find, however, no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land. Indeed, the Supreme Court held in *United States v. John* that a Mississippi resident of Choctaw Indian blood was properly under federal jurisdiction when he committed a crime on Choctaw land which had been designated a reservation, even though the tribe was "merely a remnant of a larger group of Indians, long ago removed ... [and] federal supervision over them has not been continuous." 437 U.S. 634, 653, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

The authority upon which Sherrill relies, which concerns the Nonintercourse Act, does not indicate otherwise.[23] In *Golden*

[23] Nor do any of the authorities listed by the dissent. It is true that some groups of Indians claiming tribal status, which were not federally recognized tribes, have been required to demonstrate "continuous tribal existence" in order to establish standing under the Nonintercourse Act. See Oneida IIIb, 194 F.Supp.2d at 121 n. 11 (citing Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.1979) (Mashpee I), and Canadian St. Regis Band of Mohawk Indians v. State of N.Y., 146 F.Supp.2d 170, 184 (N.D.N.Y.2001)). But Sherrill and Madison have challenged neither the OIN's standing nor its current tribal status. In other cases, when relevant, courts have quite logically noted that tribes can only recover under the Nonintercourse Act if they "were tribes at the time the land was alienated." Mashpee Tribe v. Secretary of the Interior, 820 F.2d 480, 482 (1st Cir.1987) (Mashpee II). But there is no question that the OIN was a tribe and in a trust relationship with the federal government at the time of the conveyances at issue. Neither the dissent nor Sherrill has identified any authority for the proposition that to sustain a claim under the Nonintercourse Act a federally recognized Indian tribe must demonstrate that its tribal structure remained intact continuously after unlawful conveyances of tribal land.



*Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 56 (2d Cir.1994), we stated that, in order to make a prima facie case based on a violation of the Act, a group claiming to be an Indian tribe must establish that: "(1) it is an Indian tribe, (2) the land [claimed to have been alienated in violation of the Act] is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned." All four elements are satisfied here. It is undisputed that the OIN is federally recognized and the Bureau of Indian Affairs exercises jurisdiction over, at a minimum, a thirty-two acre parcel of land within Madison County, which formed part of the OIN's historic reservation. This reservation has never been disestablished, and accordingly, the "trust relationship" between the federal government and the Oneidas has never been terminated. Nor have the Oneidas ever voluntarily abandoned this trust relationship by "choos[ing] to terminate tribal existence." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir.1979) (Mashpee I).[24] Finally, the

federal government never approved the alienation of the land at issue.

Moreover, contrary to Sherrill's contentions, even if continuous tribal existence were required, the record before us shows it. Once a tribe has been recognized, the removal of that recognition, like reservation diminishment or disestablishment, is a question for other branches of government, not the courts. *See United States v. Holliday*, 70 U.S. (3 Wall) 407, 419, 18 L.Ed. 182 (1865) ("In reference to all matters [of tribal organization], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs."); *see also Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 484 (1st Cir.1987) (*Mashpee II*) (same). The OIN is a federally recognized tribe that is a direct descendant of the original Oneida Indian Nation. *Oneida II*, 470 U.S. at 230, 105 S.Ct. 1245; *Oneida IIIb*, 194 F.Supp.2d at 119. And Sherrill has identified no legislative or executive action withdrawing recognition.

Rather, the authorities offered by Sherrill merely reflect the opinions of a handful of government officials and commentators, at various points in the last century, that Oneida tribal relations had ceased.[25] In particular, letters

[24] Sherrill, citing Mashpee II, argues that a temporary lapse of tribal status, however involuntary or unintended, causes "Non-Intercourse Act coverage [to] terminate[ ]." Sherrill Br. at 44. But Mashpee I makes clear that an "involuntary process of assimilation" is insufficient to constitute abandonment of tribal status, which can only occur voluntarily and willingly. See Mashpee I, 592 F.2d at 587. This requirement underscores the fact that a temporary lapse of tribal organization is insufficient to sever the trust relationship between a federally recognized tribe and the federal government. See The Kansas Indians, 72 U.S. at 757, 72 U.S. 737.

[25] These authorities also include a decision of the Northern District of New York, United States v. Elm, 25 F.Cas. 1006,



from the Assistant Commissioner of Indian Affairs in 1916 and 1925 stated that the tribe no longer existed in New York.[26] This conclusion is, to some degree, understandable, since most of the Oneida reservation land had been sold to the State, with the remaining parcels divided among members who, increasingly, lived separately from one another and received state services. *See Boylan*, 265 F. at 167-70. But these informal conclusions are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in *Boylan*. *Id.* at 171. Moreover, this Court determined in *Boylan* in 1920--between the time of the two letters in question--that the Oneida tribe did in fact exist. *Id.* at 171-72.

Because the Oneidas' reservation was not disestablished and because the Sherrill Properties are located within that reservation, we conclude that Sherrill can neither tax the land nor evict the Oneidas. Accordingly, we: (i) affirm the denial of Sherrill's motion for summary judgment or for a preliminary injunction based on its counterclaims in the Lead case; and (ii) affirm the grant of the OIN's cross-motion for summary judgment on its taxation claim and Sherrill's counterclaims[27] in the Lead case and its cross- motion for summary judgment in the Eviction case.

1008 (N.D.N.Y.1877), stating that since 1838, the Oneidas' "tribal government ha[d] ceased as to those who remained in this state." However, the decision also suggests continued tribal status, as the Oneidas "continued to designate one of their number as chief," albeit for certain financial tasks, and states that there are "20 families which constitute the remnant of the Oneidas resid[ing] in the vicinity of their original reservation ... their dwellings ... interspersed with the habitations of the whites." Id.

[26] Felix Cohen, whom Sherrill also cites, relies on the same source as the 1916 letter, a 1915 memorandum by a lawyer in the Office of Indian Affairs. Cohen at 416-17 n.6 (1942).

## V. Sherrill's Rule 56(f) Motion

Sherrill and the State of New York contend, in the alternative, that the District Court prematurely decided the OIN's cross-motions for summary judgment without affording Sherrill an adequate opportunity to conduct discovery on certain critical matters, in particular: (i) whether the Sherrill Properties are located within the boundaries of the reservation recognized by the Canandaigua Treaty; (ii) whether Congress modified the Canandaigua Treaty via the Buffalo Creek Treaty or otherwise; (iii) the Oneidas' continuous tribal existence; (iv) whether the properties were encompassed by the 1805 and 1807 land transfers; and (v) whether those transfers violated the Nonintercourse Act.

Federal Rule of Civil Procedure 56(f) provides an opportunity to postpone consideration of a motion for summary judgment and to obtain additional discovery by describing: (i) the information sought and how it will be obtained; (ii) how it is reasonably expected to raise a genuine issue of material fact; (iii) prior efforts to obtain the information; and (iv) why those efforts were unsuccessful. *Sage Realty Corp. v. Ins. Co. of N. Am.*, 34 F.3d 124, 128 (2d Cir.1994). The District Court denied Sherrill's motion principally because Sherrill failed to explain why it was unable to obtain the discovery sought, much of which was a

[27] We also agree with the lower court's conclusion that Sherrill's counterclaims were improper because the tribe is immune from suit in federal court. See Oneida IV, 145 F.Supp.2d at 258-59; see Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (stating that suits and cross-suits against Indian tribes are barred by tribal sovereign immunity absent a clear waiver by the tribe or congressional abrogation) (citing United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511-13, 60 S.Ct. 653, 84 L.Ed. 894 (1940)).



matter of public record, before the close of briefing. The court also noted that Sherrill had failed to identify the information sought with particularity. We review a lower court's denial of a Rule 56(f) motion for abuse of discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir.1994).

Sherrill's Rule 56(f) affidavit is simply a list of issues on which it desires more information. No specific facts or documents are requested, and Sherrill fails to indicate how any of the information sought could be expected to create genuine factual issues. Sherrill, moreover, has had a sufficient opportunity to develop and contest the issues on which it now claims to need additional discovery. Sherrill, like the *amici*, has submitted voluminous evidence in support of its position on disestablishment, tribal existence, and the Nonintercourse Act, evidence which the District Court fully considered. Sherrill was the first party to move for summary judgment--five months into discovery--on the issue of the OIN's tax liability. Under these circumstances, we conclude that the District Court did not abuse its discretion in denying the motion.

## VI. Sherriil's Motion for Leave to Amend

In the Lead case, Sherrill moved for leave to amend its answer to add the affirmative defenses of statute of limitations, laches, waiver, estoppel, *in pari delicto*, and ratification, all of which the lower court denied on futility grounds. *Oneida IV*, 145 F.Supp.2d at 259-60. On appeal, Sherrill contends that the District Court improperly denied it the opportunity to advance these defenses. We disagree.

We review the denial of a motion for leave to amend for abuse of discretion. *Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 49 (2d Cir.1999). Where, as here, the denial was based on an interpretation of law, we

review that legal conclusion de novo. *Id.* While leave to amend a pleading shall be freely granted when justice so requires, Fed.R.Civ.P. 15(a), amendment is not warranted in the case of, among other things, "futility." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss pursuant to Rule 12(b)*(*6). *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir.1991).

We agree with the lower court that Sherrill's proposed defenses would not survive such a motion. We find the *in pari delicto* and ratification defenses insufficient. *Oneida IV*, 145 F.Supp.2d at 260. Addressing delay- based arguments in *Oneida II*, the Supreme Court held that no federal limitations period applied and that it would be improvident to apply a parallel state requirement in this uniquely federal context. 470 U.S. at 240-44, 470 U.S. 226. As the Court pointed out, there is no time-bar for claims brought by the United States on behalf of Indians "to establish title to, or right of possession of, real or personal property." *Id.* at 241-43 & n. 15, 105 S.Ct. 1245. The *Oneida II* majority also strongly suggested that a laches defense is improper for similar reasons. *Id.* at 244-45 & n. 16, 105 S.Ct. 1245 ("[T]he application of laches would appear to be inconsistent with established federal policy.") (citing *Ewert v. Bluejacket*, 259 U.S. 129, 137-38, 42 S.Ct. 442, 66 L.Ed. 858 (1922) (doctrine of laches cannot bar a suit by individual Indians challenging land transactions for violating federal statutory restrictions on alienation)).

We likewise have found--in ruling on the merits of a defense in an action involving an Oneida land claim--that time-bars are inconsistent with established federal policy, because "to permit a state to enact and invoke a time-bar would in effect allow a state to terminate the relationship of trust and guardianship between the United States and the Oneidas ...



[which] may only be terminated by federal law." *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1084 (2d Cir.1982); *see also Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir.1988) (accepting rejection of laches defense as law of the case). The result would be the same regardless of whether the laches defense were asserted under federal or state law. *Oneida Indian Nation*, 691 F.2d at 1084.

In asserting its waiver and estoppel defenses, Sherrill contends that the OIN's claim to aboriginal title in the properties is inconsistent with its open-market purchases. As discussed, there is, however, no inconsistency; Indian title and fee simple ownership of reservation land are distinct. We see no reason why a tribe holding both fee simple title and Indian title in a property should be prevented from suing based on the latter. Accordingly, we agree with the lower court's conclusion that Sherrill's proposed amendment to its answer in the Lead case was futile.

**VII. Motion to Dismiss the Members Case**

In the Members case, Sherrill contends that the OIN's officers violated state law by failing to pay property taxes and collect state sales taxes on the Sherrill Properties. Its claims against the officers with regard to property taxes are insufficient for the same reason its counterclaims against the tribe are insufficient: the parcels are not taxable. Sherrill itself acknowledged the possibility of this result in its brief on appeal. See Sherrill Br. at 59 ("If ... this Court reverses the finding of Indian country ... then the pleading in the Members Case is sufficient ....").

Sherrill seeks damages for unjust enrichment arising out of the officers' alleged non-payment of state sales taxes, in particular for goods sold to non-Indians. Compl., Members Case, ¶¶ 25-27, 41-45. While individual tribal officers may

be liable for nonpayment of state sales taxes where they act outside the authority of the tribe, *see Potawatomi*, 498 U.S. at 514, 111 S.Ct. 905 (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 355, 358-59 (2d Cir.2000), there is no allegation that the OIN's officers--whom Sherrill sued in their official capacities--did so here. Consequently, Sherrill's claim for damages against the OIN's officers is no different from a claim against the tribe itself for non-payment of sales taxes. Accordingly, since the District Court correctly concluded that these officers were immune from suit on the claims related to collection of sales taxes, we affirm the dismissal of the Members case.[28]

**VIII. Motions in the Related Case**

Madison appeals from (i) the District Court's denial of its motion to dismiss pursuant to Federal Rule of Civil Procedure 19 for failure to add the Wisconsin and Thames Oneidas as plaintiffs in the Related case; and (ii) the District Court's *sua sponte* award of judgment on the pleadings to the OIN. *See Oneida IV*, 145 F.Supp.2d at 264; *Oneida Indian Nation of N.Y. v. Madison County*, 145 F.Supp.2d 268 (N.D.N.Y. 2001).

**A. Rule 19**

Reviewing for abuse of discretion, *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 725 (2d Cir.2000), we affirm the lower court's determination that the Wisconsin and Thames Oneidas were not necessary (and hence not indispensable) parties. Federal Rule of Civil Procedure 19(a) provides:

[28] We need not address the additional ground upon which the District Court found the Members case insufficient, namely, that Sherrill failed to add the OIN as a necessary and indispensable party. See Oneida IV, 145 F.Supp.2d at 263-64.



> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Should a district court determine that a non-party is necessary but is not able to join him, Rule 19(b) requires it to consider, among other things, "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties," in determining whether the action must be dismissed.

Madison contends that the Wisconsin and Thames Oneidas are necessary and indispensable parties in the Related case because of their involvement in other land claim litigation currently pending in the Northern District of New York. *See supra* Part II; *Oneida IIIa*, 199 F.R.D. 61; *Oneida IIIb*, 194 F. Supp.2d 104. The parties whose interests Madison contends require protection, however, deny they require it. On the contrary, the Wisconsin and Thames Oneidas insist that their interests are aligned with, and adequately protected by, the OIN and they will not be prejudiced if they are not joined. See 6/15/00 Aff. of Arlinda Locklear; 6/23/00 Aff. of Carey R. Ramos (submitted in 00-CV-506). Moreover, the OIN can obtain the requested declaratory and injunctive relief without the other branches as parties. Accordingly, the District Court did not abuse its discretion in determining that

the Wisconsin and Thames Oneidas are not necessary, and hence not indispensable, parties. *See ConnTech Dev. v. Univ. of Conn. Ed. Props., Inc.*, 102 F.3d 677, 682 (2d Cir.1996).

**B. Judgment on the Pleadings**

In awarding judgment on the pleadings in the Related case to the OIN, the District Court determined that:

> [a]ll the facts in the Lead Case likewise apply in this case. Moreover, as Madison County appeared as amicus curiae in the Lead Case, it had a full opportunity to be heard on the taxation issue. Accordingly, based upon the foregoing determination that the properties at issue are Indian Country and therefore not taxable, the Nation is entitled to judgment on the pleadings.

Oneida *IV*, 145 F.Supp.2d at 264.

We believe that this *sua sponte* dismissal of the Related case "on the pleadings" was procedurally improper. Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings only "[a]fter the pleadings are closed." Although Madison had moved to dismiss the complaint under Rule 19(a) for failure to join necessary and indispensable parties, it has not answered the complaint. Madison contends that, if it had an opportunity to answer, it would raise defenses distinct from those of Sherrill--although it neglects to articulate those defenses. Further, the sole ground the court provided for its decision to dismiss the case was that "[a]ll the facts in the Lead Case apply in this case." Different parcels, however, are at issue. And although there is some evidence in the record indicating that the Madison properties were part of the Oneidas' historical reservation, this evidence is meager. It may well be that the lower court's instincts on the merits of Madison's claims are correct. But rather than attempt to decide the issue based on an



incomplete record, we vacate this portion of the judgment and remand for further proceedings.

**CONCLUSION**

For the foregoing reasons, we affirm: (i) the denial of Sherrill's motion for summary judgment or, in the alternative, for a preliminary injunction based on its counterclaims in the Lead case; (ii) the denial of Sherrill's motion for leave to amend its answer in the Lead case; (iii) the denial of Sherrill's Rule 56(f) motion; (iv) the grant of the OIN's cross- motion for summary judgment in the Lead and Eviction cases; and (v) the grant of the OIN's officers' motion to dismiss the Members case. We vacate the dismissal of the Related case and remand for further proceedings consistent with this opinion.

VAN GRAAFEILAND, Senior Circuit Judge, dissenting.

I agree with my colleagues that the district court erred in granting judgment on the pleadings against Madison county. However, I disagree with their affirmance of summary judgment against Sherrill in the lead case. Accordingly, I dissent with respect to the court's holdings against Sherrill.

In the first paragraph of the majority opinion, we are instructed not to confuse the Oneida Indian Nation of New York, identified in the opinion by the terms "OIN" or "the Oneidas" with the Oneida Indian Nation, "which is not a federally recognized tribe and is not a party to these consolidated cases." The opinion then continues: "The Oneidas lived on what became central New York State long before the founding of the United States." Despite my colleague's admonishment, I assume that Judge Parker uses the word "Oneidas" here to mean the race as a whole, not the Oneida Indian Nation of New York. I see nothing in the record to indicate that the Oneida Indian Nation of New

York, which, after all, could not have been in existence before its namesake state, has existed from time immemorial. Although some courts apparently have accepted that aboriginal rights can be inherited somehow by a successor tribe that has no aboriginal rights of its own, I am not persuaded. Moreover, even assuming that aboriginal rights are heritable, I believe that there exists a substantial question as to whether any such rights inherited by the Oneida Indian Nation of New York were forfeited because its tribal existence was abandoned for a discernable period of time.

Rather than add another hundred-page opinion to the quagmire that presently exists in this area, I simply offer the following statements from what I believe are authoritative sources:

> •"The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.... The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *U.S. v. Cook*, 19 Wall. 591, 86 U.S. 591, 593, 22 L.Ed. 210 (1873).
>
> •"We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to and end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38, 37 S.Ct. 142, 61 L.Ed. 414 (1917).
>
> •"To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that ... the trust relationship between the United States and the tribe has not been terminated or abandoned."



*Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir.1994) (emphasis added).

> •"Certainly individual Indians or portions of tribes may choose to give up tribal status.... If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir.1979) (citations omitted).
>
> •"By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir.1932).
>
> •"Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land[.]" *Quapaw Tribe of Indians v. U.S*, 128 Ct.Cl. 45, 120 F.Supp. 283, 286 (1954).
>
> •"Since original Indian title is dependent upon proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe constitutes

a defense to the aboriginal claim." Cohen Felix S., Federal Indian Law, Ch. 9, Sec. A2a (1982).

•"The right of occupancy and possession is lost by abandonment, and possession, when abandoned by the Indians, attaches itself to the fee without further grant." 42 C.J.S. *Indians* § 70 (1991).

The majority claims that the historical records offered by Sherrill to show that the Oneidas cannot establish continuous tribal existence "merely reflect the opinions of a handful of government officials and commentators[.]" My colleagues' attempts to minimize the significant evidence of tribal dissolution in the record are misleading. Sherrill cites numerous persuasive authorities, most notably contemporaneous reports by both the Commissioner of Indian Affairs and the Department of the Interior, in support of its argument that the tribe ceased to function for a period of time:

•"[The Oneida] tribal government has ceased as to those who remained in [New York] state.... [The designated chief's] sole authority consists in representing them in the receipt of an annuity .... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *U.S. v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y.1877).

•"The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers."



*1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*. (JA 1229).

•The 1892 Census map of New York depicts no Oneida reservation. (JA 995).

•"The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." *1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*. (JA 1231).

•"The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." *1900 Annual Reports of the Department of the Interior*. (JA 1234).

•"The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections.... At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." *1901 Annual Reports of the Department of the Interior*. (JA 1238-39).

> •"The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have 'squatted' on the Onondaga Reserve: so many of these have intermarried with the Onondaga as to preclude any probability of their removal.... About 120 of them are carried on the agency rolls as 'Oneidas at Oneida' which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." *1906 Annual Reports of the Department of the Interior*. (JA 1241).

Ironically, after dismissing these federal authorities out of hand, the majority argues that recognition of the Oneida Indian Nation of New York by the Bureau of Indian Affairs, which is merely the modem day corollary to the Department of the Interior offices responsible for most of the above-cited reports, must end our inquiry into the tribe's continuous tribal existence. I disagree. Our court, in *Golden Hill*, observed that "tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." *Id.* at 57. We further stated that, "[r]egardless of whether the BIA were to acknowledge Golden Hill as a tribe for purposes of federal benefits, Golden Hill must still turn to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act." *Id.* at 58. "The two standards overlap, though their application might not always yield identical results." *Id.* at 59.

Moreover, the degree of deference we owe to BIA recognition in this case ought to be carefully measured, not only because prior reports by the Department of the Interior cast doubt on the continual existence of the New York Oneidas, but also because BIA recognition was granted to the Oneida Indian Nation of New York prior to the BIA's creation of the comprehensive regulations set forth in 25



C.F.R. Part 83 in 1978. In describing the BIA tribal recognition process prior to the passage of these regulations, the First Circuit has stated that the BIA "has not historically spent much effort in deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the [BIA] has dealt." *Mashpee*, 592 F.2d at 581. It seems unlikely that the Oneida Indian Nation of New York volunteered to the BIA any evidence that would have weakened its tribal recognition claim, especially when one considers that they apparently were unresponsive to Sherrill's discovery requests on this issue during litigation. Our court ought not to accept reflexively BIA recognition as dispositive of continuous tribal existence when that recognition was granted before the Bureau had adopted its comprehensive criteria and when the record contains such compelling evidence of a period of tribal dissolution.

The majority also contends that the issue of the Oneida's tribal existence was satisfactorily resolved by our court in *Boylan*. However, *Boylan* was decided nearly six years before the Supreme Court enunciated in *U.S. v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 70 L.Ed. 1023 (1926), the requirements for establishing tribal existence under the Nonintercourse Act. Following *Candelaria*, an Indian group seeking to prove tribal existence was required to show that it was "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id.* (citation omitted); *see also Golden Hill*, 39 F.3d at 59. It is far from clear that the Boylan majority would have reached the same conclusion under the *Candelaria* criteria.

With all of the foregoing as background, we now come to the question that constitutes the heart of this appeal: viz. do my colleagues err in granting summary judgment in favor of the

tribe? I believe that the question must be answered in the affirmative. The standard for summary judgment bears repeating. The burden is on the moving party to establish that there exists no genuine issue as to any material fact. *See Opals On Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 367 (2d Cir.2003); *Burtnieks v. City of New York*, 716 F.2d 982, 985 (2d Cir.1983); *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626 (2d Cir.1972). All evidentiary material submitted must be viewed in the light most favorable to, and all inferences must be drawn in favor of, the non-moving party. *See United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Opals on Ice*, 320 F.3d at 367; *Burtnieks*, 716 F.2d at 985. Bearing in mind the deference that we owe Sherrill under these standards, summary judgment clearly should not be granted to the plaintiff. The record presents significant, unresolved questions of fact as to whether the Oneida Indian Nation of New York has been in existence continuously over the last century and a half.



**OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK**
**DECIDED JUNE 4, 2001**

United States District Court
N.D. New York

ONEIDA INDIAN NATION OF NEW YORK, Plaintiff,
v.

THE CITY OF SHERRILL, NEW YORK, Defendant.

The State of New York, Amicus Curiae,
Madison County, Amicus Curiae,
Oneida County, Amicus Curiae,
Oneida Ltd., Amicus Curiae.
The City of Sherrill, New York, Plaintiff,
v.
Oneida Indian Nation of New York, Defendant.

The City of Sherrill, New York, Plaintiff,
v.
Ray Halbritter; Keller George; Chuck Fougnier; Brian Patterson; Marilyn John; Clint Hill; Dale Rood; Dick Lynch; Ken Phillips; Iva Rodgers; Beulah Green; Ruth Burr, Defendants.

Oneida Indian Nation of New York, Plaintiff,
v.
Madison County, Defendant.

Nos. 5:00-CV-223 (Lead Case), 5:00-CV-327 (Eviction Case), 5:00-CV-1106 (Member Case), 5:00-CV-506 (Related Case).

June 4, 2001

HURD, District Judge.

*MEMORANDUM-DECISION and ORDER*

*"This litigation makes abundantly clear the necessity for congressional action."*

So said the United States Supreme Court in 1985 in reference to the Oneida Indian Nation land claim. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 253, 105 S.Ct. 1245, 1261, 84 L.Ed.2d 169 (1985) (emphasis added) [hereinafter "*Oneida II*"].

Rather than heed the advice of our highest Court, Congress has not enacted legislation to extinguish or resolve Indian title and land claims in New York State. It has turned a deaf ear to the Court and remained silent for over sixteen (16) years.

Further, heroic efforts over many years on the part of Senior District Judge Neal P. McCurn and Settlement Master Ronald J. Riccio to achieve a global settlement of the Oneida Indian Nation claims were met with resistance and ultimate failure. *See Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 66 (N.D.N.Y.2000). A political resolution by legislation or agreement has apparently been rejected by Federal, State, and Local governments and by the Oneida Indian Nation. *See id.* at 66.

Instead, the parties have increasingly turned to the courts to settle their disputes. These cases are examples. Unlike the executive and legislative branches of government, the judiciary cannot turn a deaf ear in the face of disputes such as these. Rather, a judge must put aside any personal opinions



or ideas and apply the Constitution, Treaties, and laws of this great country. This is the result.

## I. *INTRODUCTION*

The Oneida Indian Nation of New York ("the Nation" or "the Oneidas") filed a complaint on February 4, 2000, in the lead case, 00-CV-223, pursuant to 28 U.S.C. § 1331, seeking to prevent attempts by the City of Sherrill, New York ("Sherrill") to enforce property tax laws against properties owned by the Nation [hereinafter "Lead Case"]. Sherrill moved for summary judgment, or, in the alternative, for a preliminary injunction. The Nation opposed Sherrill's motion and cross-moved for summary judgment. Additionally, Sherrill has moved for permission to amend its answer to add certain affirmative defenses. The Nation opposes the motion to amend.

On February 22, 2000, the Nation removed to this court, pursuant to 28 U.S.C. § 1441, a petition for eviction filed by Sherrill in New York State Supreme Court, Oneida County, on February 15, 2000 [hereinafter "Eviction Case"]. In the Eviction Case, 00-CV-327, Sherrill sought to evict the Nation from the properties that are the subject of the Nation's February 4, 2000, complaint. Therefore, the Eviction Case was consolidated with the Lead Case on June 14, 2000.

Sherrill filed a complaint on July 17, 2000, pursuant to 28 U.S.C. § 1362, seeking declaratory relief and damages from individually named representatives of the Nation's Men's Council and Clan Mothers relating to the taxation of the properties at issue in the two aforementioned actions [hereinafter "Member Case"]. An amended complaint was filed as of right on August 7, 2000. The Member Case, 00-CV-1106, was thereafter consolidated with the Lead and Eviction Cases. The individually named Nation representatives, Ray Halbritter, Keller George, Chuck

Fougnier, Brian Patterson, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Iva Rodgers, Beulah Green, and Ruth Burr (collectively "Nation representatives") moved to stay this action and to dismiss. Sherrill opposed the motion.

On November 13, 2000, Madison County and Oneida County ("the Counties"), New York State, and Oneida Ltd. filed, with permission, briefs as amici curiae in support of Sherrill's motion for summary judgment or alternatively for injunctive relief and in opposition to the Nation's motion for summary judgment. The Nation did not object to the filing of the amici curiae briefs, but did submit a responsive brief.

Also currently pending is a related case, 00-CV-506, filed by the Nation pursuant to 28 U.S.C. § 1331, against Madison County seeking to prevent enforcement of the County's property tax laws [hereinafter "Related Case"]. A motion to dismiss is pending in that action.

Oral argument was heard regarding all motions on March 9, 2001, in Utica, New York. Decision was reserved.

## II. *FACTS*

### A. *City of Sherrill Properties*

In 1997 and 1998 the Nation purchased, in open market transactions, fee simple title to certain parcels of land within the municipality of Sherrill. These parcels are designated by Sherrill as 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26, 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015-2-40.3, 322.015- 2-45.1, 322.015-2-47. The Nation operates a gasoline filling station with convenience store and a textile manufacturing and distribution facility on the properties. Sherrill assessed property taxes against these parcels. The Nation did not pay the assessed taxes, asserting



that the properties are contained within the Oneida Indian Reservation ("the Reservation") and therefore are nontaxable by state municipalities.

The Nation has a Silver Covenant Chain Grant program under which it makes ad valorem grants to schools and municipalities in which repossessed aboriginal lands are located. In order to participate in this program the municipality must remove such lands from its tax rolls pending resolution of the Nation's land claims. Sherrill and Madison County have not participated in the Nation's Silver Covenant Chain Grant program.

On August 7, 1997, Sherrill sent the Nation notices of tax delinquency. (Carmen Aff. sworn Sept. 11, 2000, Ex. 17 [hereinafter "First Carmen Aff."].) One notice set forth a total delinquency of $2,239.23, including overdue tax, penalties, and interest. A second and third notice each set forth a total delinquency of $22.59, including overdue tax, penalties, and interest. Thus, the total delinquency at that time was $2,284.71. None of the three notices identified a parcel or parcels. The notices each warned, "If you do not wish to have your name and property advertised for tax sale, payment of the unpaid taxes must be received by September 2, 1997." *Id.* In keeping with its assertion that the properties were nontaxable Reservation land, the Nation did not respond to the notices.

In September and October 1997 Sherrill advertised, in a local newspaper, that three Nation parcels would be sold for 1997 unpaid taxes on November 5, 1997. These parcels were identified as 322.014-1-26, 322.014-1-23, and 322.014-1-25. Sherrill did not serve the Nation with notice of the tax sale. The tax sale was held on that date and Sherrill purchased the properties. Pursuant to the Sherrill City Charter, a property owner may redeem a property sold at tax sale within two years of the sale. In November 1999 Sherrill published a

notice in a local newspaper that the redemption period for the three parcels would expire on February 8, 2000. On January 10, 2000, Sherrill personally served notice on the Nation that the expiration period to redeem the properties was February 8, 2000. On February 9, 2000, Sherrill recorded deeds for the properties. On February 17, 2000, Sherrill initiated eviction proceedings in New York State Supreme Court, Oneida County.

Meanwhile, Sherrill assessed property taxes and initiated enforcement proceedings against several other Nation properties. Sherrill purchased four parcels, 322.015-2-1, 322.014-1-24, 322.015-2-65, and 322-015-2-64, at a tax sale on November 5, 1998. On March 6, 2000, Sherrill notified the Nation of the impending expiration of the redemption period of November 5, 2000, for these four parcels.

On November 10, 1999, Sherrill purchased an additional three parcels, 322-015- 2-40.3, 322-015-2-45.1, 322-015-2-47 at tax sale. On March 6, 2000, Sherrill notified the Nation that the redemption period for these three parcels would expire on November 10, 2001.

Sherrill alleges a total tax liability for all of these parcels of approximately $15,000. The above-captioned actions followed.

**B. *Madison County Properties***

In the 1990s the Nation acquired thirteen parcels of land located within Madison County. These parcels are identified as 28.-2-13.11, 28.-2-13.2, 36.5-1-20, 36.38-1-34, 36.6-1-4, 36.38-1-33, 36.38-1-32, 36.62-2-21, 91.-1-51, 36.6-1-1, 36.6-1-3, 36.-1-2, and 28.-2-13.12. The county assessed property taxes against these parcels. The Nation again asserted that these properties were within the Reservation and therefore were nontaxable. On December 1, 1999, the county initiated



an *in rem* foreclosure action, for nonpayment of taxes, against these parcels in New York State Supreme Court, Madison County. The Nation alleges that Madison County never provided it with notice or a redemption period, as required by New York State law.

**C. *Historical Background***

A brief discussion of the historical background of the Nation and its lands, as well as the federal policy toward the Indians lends perspective to the claims and the arguments. From before the Revolutionary War colonists' interaction with the Indians was in the spirit of cooperation and good faith. The Indians' right to the possession of their aboriginal lands was assumed, and termination of such title was restricted. *Oneida II*, 470 U.S. at 234, 105 S.Ct. at 1251. The Oneidas[1] claimed aboriginal lands of six million acres in Central New York, from Lake Ontario to the Adirondack foothills and from Pennsylvania north to the St. Lawrence River. *Id.* at 230, 105 S.Ct. at 1249. In 1784, shortly after the Revolutionary War ended, the first treaty between the United States and the Indians was executed, at Fort Stanwix, New York (present day Rome, New York). The United States, in recognition for the Oneidas' support during the war, guaranteed the Oneidas security " 'in the possession of the lands on which they are settled.' " *Id.* at 231, 105 S.Ct. at 1249-50 (quoting the Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784)).

In 1790 Congress passed, in keeping with the policy of protecting the Indians and their lands, the first Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137. *Id.* Commonly referred to as the Nonintercourse Act, now codified at 25

[1] The Oneidas were one of the Six Nations of the Iroquois, "the most powerful Indian Tribe in the Northeast at the time of the American Revolution." Id. at 230, 105 S.Ct. at 1249. The Six Nations consisted of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora nations.

U.S.C. § 177, this legislation prohibited conveyance of Indian lands except by treaty with the federal government. *Id.* at 231, 105 S.Ct. at 1251. Later amendments continue the prohibition on alienation of Indian land without congressional action. *See* 25 U.S.C. § 177.

In 1788 New York State purchased most of the Nation's remaining land, reserving 300,000 acres to the Nation. *Oneida II*, 470 U.S. at 231, 105 S.Ct. at 1250. Other treaties, such as the Treaty of Harmar, 7 Stat. 33 (Jan. 9, 1789), and the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), reaffirmed the federal government's promise of security to the Oneidas in the possession of their lands. *Oneida II*, 470 U.S. at 231, 105 S.Ct. at 1250. The Sherrill parcels are among the lands reserved to the Nation in 1788 and confirmed as reservation land in the Treaty of Canandaigua.[2] (Thomas Decl. ¶ 10.) In 1795 New York State purchased the majority of the Oneidas' remaining 300,000 acres. *Oneida II*, 470 U.S. at 231, 105 S.Ct. at 1250. Thereafter, fee title to the land has passed in free market transactions.[3]

Beginning in the early 1800's the federal policy toward the Indians shifted toward removing Indians from the east into the western territories. Felix S. Cohen, *Handbook on Federal Indian Law* 78-79 (1982 ed.) [hereinafter "Cohen"]. Treaties during this period provided for the relinquishment of Indian land in the east and set apart reservation land for the

[2] Sherrill contends that issues of fact remain as to whether the Sherrill parcels are within the reservation confirmed by the Treaty of Canandaigua. (Sacks Aff. Jan. 30, 2001, 4.) However, Sherrill has adduced no competent evidence to raise such a question of fact.

[3] The United States Supreme Court has determined that the Oneidas have a federal common law right of action for violation of their possessory rights to these lands, due to the undisputed lower court finding that the 1795 purchase violated the Nonintercourse Act. Id. at 233, 236, 105 S.Ct. at 1250, 1252.



Indians in the west. *See generally id.* at 78-92. Movement of the eastern tribes to the west freed the eastern land for white settlements.

Between 1820 and 1822 some Oneidas and other New York Indians relocated to land purchased on their behalf from the Menominee and Winnebago nations in Wisconsin.[4] *New York Indians*, 170 U.S. at 12-14, 18 S.Ct. at 533. Some disagreement about the land ensued, and approximately 500,000 acres in Wisconsin were reserved for the use of the Oneidas and other New York Indians. *Id.* at 14, 18 S.Ct. at 533. Other Oneidas relocated to Ontario, Canada. *Oneida Indian Nation v. County of Oneida*, 434 F.Supp. 527, 536 (N.D.N.Y.1977) (Port, J.), *aff'd*, 719 F.2d 525 (2d Cir.1983), *aff'd in part & rev'd in part*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). The Oneida Nation thus splintered into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Thames Oneidas. *See id.*

In 1830 Congress passed the Indian Removal Act, ch. 148, 4 Stat. 411, authorizing the exchange of eastern land for land west of the Mississippi River. Cohen at 81. Among the removal treaties into which the Indians and the federal government entered was the Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838). *New York Indians*, 170 U.S. at 1, 18 S.Ct. at 531. Pursuant to the Treaty of Buffalo Creek the New York Indians, including Oneidas, ceded Wisconsin reservation lands in exchange for reservation lands west of the Mississippi River in what is now Kansas. *Id.* at 15, 18 S.Ct. at 533. The Treaty of Buffalo Creek further provided that New York Oneidas "hereby agree to remove to their new homes in the Indian territory, as soon as they can make

[4] Also relocating to the 500,000-acre Wisconsin reservation during this period were some members of other tribes of the Six Nations, as well as the St. Regis, Stockbridge, and Munsee tribes. New York Indians v. United States, 170 U.S. 1, 12-13, 18 S.Ct. 531, 533, 42 L.Ed. 927 (1898).

satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." 7 Stat. § 550 Art. 13. However, the Indians did not remove to Kansas. *New York Indians*, 170 U.S. at 9-10, 18 S.Ct. at 532-33. Moreover, there is no evidence that "satisfactory arrangements with the Governor of the State of New York" were ever made for the purchase of the Oneidas' New York lands.

Toward the latter 1800's the federal policy shifted toward assimilating the Indians into the white culture. *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 1164, 79 L.Ed.2d 443 (1984). This assimilation policy was carried out through allotment. *See id.* at 467, 104 S.Ct. at 1164; *see generally* Cohen at 128-132. The Dawes Act, ch. 119, 24 Stat. 388, and subsequent surplus land acts,[5] furthered this policy. *See* Cohen at 130-32. The surplus land acts provided for the allotment of set amounts of acreage to individual Indians, with the land held in severalty. *Id.* at 130-31. The allotments made to individual Indians were inalienable for twenty- five years, in keeping with the federal policy of protecting the Indians and their lands, after which it was thought that the Indians would assimilate into the culture of the white settlers who by then would surround the allotted land. Small amounts of land were reserved for tribal ownership to be used for common purposes, such as education. Unallotted, or surplus, lands were then opened for homesteading by white settlers. More than 90 million acres of tribal land were opened for settlement in this manner.

Allotment resulted in a checkerboard pattern of Indian and non-Indian ownership of reservation lands. Depending upon Congressional intent in opening the lands, some surplus lands

[5] In 1871 Congressional action ended treaty-making with the Indians. Cohen at 107 & n. 371. Thereafter, congressional action, in statutory form, was required for each cession or other conveyance of Indian land.



have been found to continue to constitute reservation land, *see, e.g., Solem*, 465 U.S. at 481, 104 S.Ct. at 1171, and in some cases not, *see, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 338, 118 S.Ct. 789, 805, 139 L.Ed.2d 773 (1998).

By the early twentieth century the federal policy again shifted, recognizing that assimilation was not occurring and preservation of the Indian culture was not only acceptable but desirable. Cohen at 144. In 1934 the Indian Reorganization Act ended allotment, encouraged tribal self-government, made funds available for economic improvement of the Indians, and made further provisions for protecting Indian lands. *See id.* at 147-49. However, as World War II came to an end resistance to reorganization developed and a policy aimed at terminating federal control and supervision of the Indian tribes evolved. *Id.* at 152-59. Once terminated, a tribe lost its sovereignty and became subject to state jurisdiction. *Id.* at 174-75.

The termination policy was repudiated in 1958, and an era of Indian self- determination began. *Id.* at 180. This policy shift reflected the overall rise in concern for the civil rights of all ethnic minorities. *Id.* at 180- 81. Beginning in 1973 Congress restored the sovereignty of several of the tribes previously terminated. *Id.* at 186-87. Programs were funded to improve Indian housing, education, economic development, health, and culture. *Id.* at 189-96. Moreover, a policy toward the development of reservations and return of aboriginal lands to the Indians arose. *Id.* at 196-200.

From the late 1700s until the middle 1960s the Oneidas attempted, in vain, to obtain redress for land claims and other grievances. *Oneida Indian Nation of New York State v. County of Oneida*, 719 F.2d 525, 529 (2d Cir.1983) (noting that the Oneidas perceived their treatment by the State during this period as "improper, deceitful, and overreaching"). In

1970 the Nation brought a lawsuit seeking damages for the "illegal use and occupancy of a part of their aboriginal land" during 1968 and 1969. *Id.* at 532. The suit was originally dismissed at the trial court level for lack of jurisdiction. *Id.* at 530. On appeal, the United States Supreme Court found that federal question jurisdiction existed. *Oneida Indian Nation v. County of Oneida, New York*, 414 U.S. 661, 678, 94 S.Ct. 772, 782-83, 39 L.Ed.2d 73 (1974). After a finding of liability and the assessment of damages in the trial court,[6] the United States Supreme Court affirmed the Oneidas' federal common law right of action for unlawful possession of their lands. *Oneida II*, 470 U.S. at 233, 105 S.Ct. at 1251.

In 1974 the New York and Wisconsin Oneidas filed an additional land claim action. *See Oneida Indian Nation*, 199 F.R.D. at 66. At issue in that action is approximately 250,000 to 300,000 acres that the Oneidas claim was illegally alienated by some thirty agreements. *Id.* at 66 & n. 3.

In the 1990s the Nation began reacquisition of lands within the Reservation. These reacquisitions have taken place in free market transactions, and the Nation received fee simple title to the properties.

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[6] The trial court assessed damages in the amount of "$9,060 plus interest against Madison County and $7,634 plus interest against Oneida County for their unlawful use and occupation of the Oneidas' land for the years 1968 and 1969." Oneida Indian Nation of New York State, 719 F.2d at 540. The Second Circuit affirmed the finding of liability but remanded for recomputation of damages. Id. at 544. The United States Supreme Court granted the petition for certiorari brought by Madison and Oneida Counties and New York State, see 465 U.S. 1099, 104 S.Ct. 1590 (1984), to answer the question of whether the Oneidas "may bring a suit for damages for the occupation and use of tribal land allegedly conveyed unlawfully in 1795." 470 U.S. at 229, 105 S.Ct. at 1248-49.



## III. *CLAIMS, COUNTERCLAIMS, AND DEFENSES*

### A. *Lead Case*

In the Lead Case the Nation sues Sherrill to terminate its efforts to enforce its *ad valorem* property tax laws with respect to land owned by the Nation located within Sherrill. The Nation avers that the properties at issue are within and are a part of the Reservation recognized by the 1794 Treaty of Canandaigua. The Nation further avers that the properties have always been a part of the Reservation, although the Nation was not in possession, and the federal government has never changed the Reservation status nor made properties within the Reservation subject to state or local taxation. The Nation claims that in 1805 New York State caused the properties to be conveyed to one Cornelius Dockstader, a Nation member. In 1807 New York purported to give permission for Dockstader to sell the land, and Dockstader did sell the land to a non-Indian. Thereafter the properties have been in the possession of non- Indians until the reacquisition of the properties in 1997-98. The Nation claims that these conveyances were in violation of the Nonintercourse Act, 25 U.S.C. § 177, and therefore are void *ab initio*.

The Nation first claims that the properties constitute Reservation land and therefore are Indian Country within the meaning of 18 U.S.C. § 1151. According to the Nation, under Article I, Section 8 of the United States Constitution authority over this property is exclusive to the federal government, precluding the state and its political subdivisions from imposing their taxes. Imposition of such taxes by the states and its political subdivisions also violates the Nation's tribal sovereign immunity. The Nation seeks redress from the aforesaid violations of the rights guaranteed by the Constitution and laws of the United States pursuant to 42 U.S.C. § 1983.

For its second claim the Nation avers that the process by which Sherrill purported to deprive the Nation of its properties and evict it from the properties failed to provide due notice. The Nation therefore seeks redress under 42 U.S.C. § 1983 for this alleged violation of its due process rights as secured by the Constitution and laws of the United States and the laws of New York.

The Nation seeks a declaration that Sherrill may not impose or attempt to collect property taxes based upon lands owned and possessed by the Nation within Sherrill, that the Nation and its lands are not subject to taxation by Sherrill, that Sherrill's purported conveyances of the properties for delinquency of taxes are null and void, and that Sherrill may not evict the Nation from its lands and any attempt to do so are null and void. The Nation further seeks an injunction prohibiting Sherrill and any other person in active concert or participation with Sherrill from subjecting the Nation and its lands to property taxation, prohibiting it from interfering with the Nation's ownership and possession of its lands and from any effort to evict the Nation from such lands, and mandating that they void and rescind all notices, liens, sales, auctions, conveyances and other official documents or acts taken with respect to enforcement of the property tax laws as against the Nation and its lands. Finally, the Nation seeks attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

Sherrill answered, denying the material allegations of the complaint. Sherrill also brings counterclaims. Sherrill avers that despite wrongful nonpayment of taxes, and in some cases foreclosure, the Nation remains in possession of the properties. Sherrill claims that the Nation has been and is being unjustly enriched by receipt of valuable municipal benefits including police and fire protection, garbage removal, road maintenance, and zoning enforcement and planning. First Sherrill seeks a declaration that it may



properly assess property taxes against these properties and any other properties that may come into the Nation's possession in the future. Second, Sherrill seeks a judgment evicting the Nation from the foreclosed property. Third, Sherrill seeks damages for the unjust enrichment of the Nation for services provided by the municipality. Fourth, Sherrill requests a preliminary and permanent injunction prohibiting the Nation from purchasing additional properties, any part of which are located within Sherrill's boundaries. Finally, Sherrill seeks an order enjoining the Nation from building and/or expanding upon the existing building structure, or erecting new structures, on the foreclosed properties.

The Nation denies the material allegations of the counterclaims, including Sherrill's right to tax the properties. The Nation also asserts the affirmative defenses of failure to state a claim; sovereign immunity; violation of federal law; federal law preemption; the Supremacy Clause of the United States Constitution; due process violation; violation of the Nonintercourse Act; violation of the Equal Protection Clause of the United States Constitution; violation of the Due Process Clause of the United States Constitution; violation of the Takings Clause of the United States Constitution; violation of the Privileges and Immunities Clauses of the United States Constitution; prohibition of the relief requested by the Indian Commerce Clause, the Fifth Amendment, and the Fourteenth Amendment; failure of the Congress to authorize taxation or alienation of the lands in dispute; entitlement to set-off for funds paid to Oneida County pursuant to the Silver Covenant Chain Grant program; nonjusticiability; and estoppel due to Sherrill's refusal to accept the Silver Covenant Chain Grant payments.

**B. *Eviction Case***

Sherrill petitioned New York State Supreme Court, Oneida County, to order an eviction of the Nation from the properties designated as 322.014-1-23, 322.014- 1-25, and 322.014-1-26. The petition asserts that Sherrill acquired the title to these properties through foreclosure and sale for nonpayment of taxes. The Nation removed the action to this court asserting that federal law completely preempts Sherrill's claim that it has title to and the right to possess this land and the eviction action is a compulsory counterclaim to the Lead Case. In answer the Nation denies that Sherrill has the right to assess taxes against the properties or that it holds valid title to the properties. The Nation asserts the affirmative defenses of failure to state a claim; sovereign immunity; federal law protection of reservation land; federal preemption of state and local law; the Supremacy Clause of the United States Constitution; insufficient process and service of process; violation of due process as set forth in the Lead Case; and the petition is duplicative of a compulsory counterclaim in the Lead Case.

***C. Member Case***

Sherrill avers that the Nation representatives dominate and control the Nation and its activities. Sherrill claims that the Nation representatives caused the Nation to refuse to pay the property taxes it assessed against the properties and to fail to collect state sales tax on goods sold on the properties, including goods sold to non-Indians. Sherrill further avers that the Nation's refusal to pay property taxes and collect sales taxes, at the direction of the Nation representatives, causes tax-paying citizens to suffer in the quality and availability of municipal services. Sherrill asserts that because the Nation may plead sovereign immunity as a bar to any lawsuit to collect taxes owed, the responsible Nation representatives may be sued. As a first cause of action



Sherrill seeks a declaratory judgment that it may lawfully impose and attempt to collect property taxes from the Nation representatives on the properties currently owned by the Nation and on any properties acquired by the Nation in the future, and that its Charter applies to such properties. Sherrill further seeks a declaration that the Nation representatives are in violation of New York State law because the Nation refuses to collect state sales tax on the properties. Sherrill's second cause of action is for an order evicting the Nation representatives and all other Oneidas from the foreclosed property. Third, Sherrill seeks damages for what it alleges to be unjust enrichment of the Nation by provision of municipal services. Fourth, Sherrill requests a preliminary and permanent injunction prohibiting the Nation representatives from purchasing additional properties, any part of which are located within the boundaries of Sherrill, without first agreeing to pay property tax and agreeing to collect state sales tax on any additional properties. Sherrill's fifth cause of action is for a preliminary and permanent injunction prohibiting the Nation representatives from expanding and/or building upon the existing structure and/or erecting new structures on Nation-owned properties within Sherrill boundaries.

In lieu of an answer the Nation representatives move for a stay pending a decision on summary judgment in the Lead Case, which may moot this action, or to dismiss. The motion to dismiss is based upon failure to state a claim because the Nation representatives are not the owners of the properties; Sherrill lacks authority to enforce property taxes due to federal law; Sherrill lacks authority to enforce the state sales tax law and the property tax as set forth in the Sherrill City Charter under the property and sales tax laws of New York State; Sherrill has failed to name indispensable parties the Nation, New York State, and all other owners of land in Sherrill; and tribal sovereign immunity.

**D. *Related Case***

The Nation brings this action to prevent Madison County from pursuing further efforts to enforce its *ad valorem* property tax laws with respect to Nation lands located within the County. The Nation avers that the properties at issue are located within and are part of the Reservation recognized in the 1794 Treaty of Canandaigua. The Nation further avers that the federal government has never modified the reservation status of these properties nor made them subject to taxation by a state or local government. One of the properties at issue was alienated by a 1795 Treaty between the Oneidas and New York State. The other properties were transferred by a Treaty with New York State in 1807. Since 1795 and 1807, respectively, the properties were out of the Nation's possession until their reacquisition in the 1990s. The Nation avers that neither transaction met the requirements of the Nonintercourse Act, and therefore were void *ab initio*.

The Nation's first claim is that federal law, including the 1794 Treaty of Canandaigua; Article I, Section 8 of the United States Constitution; the Nonintercourse Act; and federal common law, preempt any right of Madison County to impose taxes upon the properties and attempts by the county to collect such taxes violates federal law. This claim also avers that the county's attempts to collect such taxes violate the Nation's sovereign immunity, as well as the rights, privileges, and immunities secured to the Nation by the United States Constitution and laws. Secondly, the Nation avers that the county failed to give it the process it was due with regard to taxation and foreclosure upon Nation lands. The Nation therefore seeks a declaration that the county may not impose or seek to collect *ad valorem* property taxes from the Nation based upon the lands it owns and possesses; the Nation and its lands are not subject to such taxation; any purported taxation or foreclosure for tax



delinquency is null and void; and the state court is without jurisdiction or power with respect to taxation of Nation lands. It also seeks an injunction prohibiting Madison County from subjecting the Nation and its lands to *ad valorem* property taxation; prohibiting the county from any interference with ownership and possession of its lands and from efforts to foreclose on the Nation's lands or to litigate in state court concerning taxation of its lands; and mandating that the county void and rescind all notices, liens, petitions, and other official documents or acts taken with respect to enforcement of such taxes as against the Nation and its lands. Finally, the Nation seeks attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

Madison County filed its motion to dismiss in lieu of an answer. The county asserts that the Wisconsin and Thames Oneidas are indispensable parties, and as they cannot be joined, the action should be dismissed pursuant to Fed.R.Civ.P. 19. The Nation opposes. This motion is addressed in a separate Memorandum-Decision and Order filed this day.

## IV. *DISCUSSION*

### A. *Summary Judgment Standard*

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); *Lang v. Retirement Living Pub. Co.*, 949 F.2d 576, 580 (2d Cir.1991); *Cayuga Indian Nation of New York v. Cuomo*, 667 F.Supp. 938, 940 (N.D.N.Y.1987). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material

fact. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir.1990). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Project Release v. Prevost*, 722 F.2d 960, 968 (2d Cir.1983).

Disputes as to irrelevant or unnecessary facts are immaterial. *Cayuga Indian Nation*, 667 F.Supp. at 940 (quoting *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510). " 'Any proof or evidentiary requirements imposed by the substantive law are not germane to [the materiality] inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.' " *Id.* (quoting *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510).

When the moving party has met its the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. at 1356. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S.Ct. at 2511; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. Liberty Lobby, Inc., 477 U.S. at 248- 49, 106 S.Ct. at 2510; see Matsushita Elec. Indus. Co., 475 U.S. at 587, 106 S.Ct. at 1356 (stating that there is no genuine issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party"). Merely colorable or not significantly probative evidence is insufficient to



withstand summary judgment. *Cayuga Indian Nation*, 667 F.Supp. at 940-41 (quoting *Liberty Lobby, Inc.*, 477 U.S. at 249- 50, 106 S.Ct. at 2511).

**B. *Indian Country***

The parties agree that the basic question for resolution in this case is whether the properties in issue are Indian Country. If the properties are Indian Country, the state and its municipalities lack jurisdiction to impose property taxes,[7] absent explicit congressional direction. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S.Ct. 2214, 2220, 132 L.Ed.2d 400 (1995) (citation omitted); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128, 113 S.Ct. 1985, 1993, 124 L.Ed.2d 30 (1993); *see McClanahan v. State Tax Comm'n*, 411 U.S. 164, 169, 93 S.Ct. 1257, 1260-61, 36 L.Ed.2d 129 (1973) (citing *The Kansas Indians*, 72 U.S.(5 Wall.)737, 18 L.Ed. 667 (1866)).

The statutory definition of Indian Country, although found in the criminal code at 18 U.S.C. § 1151, " 'applies to questions of both criminal and civil jurisdiction.' " *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir.1996) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct. 1083, 1088, 94 L.Ed.2d 244 (1987)). Classification of certain lands as Indian Country "is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian land." *Id.* (internal quotations omitted). The determination of whether certain land constitutes Indian Country is a matter for the court rather than the jury. *United States v. Roberts*, 185 F.3d 1125, 1140 (10th Cir.1999) (citing *United States v. Cook*, 922 F.2d 1026, 1031-32 (2d Cir.1991)).

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[7] No argument is made that should a finding be made that the properties in question are Indian Country, they are nonetheless taxable.

Indian Country includes " 'formal and informal reservations, dependent Indian communities, and Indian allotments.' " *Chickasaw Nation*, 515 U.S. at 453 n. 2, 115 S.Ct. at 2217 n. 2 (quoting *Sac & Fox Nation*, 508 U.S. at 126, 113 S.Ct. at 1991); *Thompson v. County of Franklin*, 15 F.3d 245, 250 (2d Cir.1994). Section 1151 provides, with exceptions not relevant here, that Indian Country means:

> (a) land within the limits of an Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which haven not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Thus, a formal reservation falls within the definition of Indian Country. *Cabazon Band of Mission Indians*, 480 U.S. at 207 n. 5, 107 S.Ct. at 1087 n. 5. However, formal reservation status is not a prerequisite to qualification as Indian Country. *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1249 (10th Cir.2000). Rather, determinative is whether there has been a valid set aside of the land by the federal government for the Indians' use and federal supervision of the land. *Id.* at 1249-50; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991).

Reservation status of Indian land may be changed only upon a plain and unambiguous expression of congressional intent to do so. *Cayuga Indian Nation*, 667 F.Supp. at 944 (citing



*Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258); *Narragansett Indian Tribe*, 89 F.3d at 914. Congressional intent to terminate Indian title to land will not be " 'lightly implied' " because of the "strong policy of the United States 'from the beginning to respect the Indian right of occupancy.'" *Oneida II*, 470 U.S. at 248, 105 S.Ct. at 1258 (quoting *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345-46, 62 S.Ct. 248, 251, 86 L.Ed. 260 (1941)).

Because Congressional action is required to alienate Indian land, 25 U.S.C. § 177, either a treaty approved by Congress[8] or a statute must plainly and unambiguously express the intent to effect such an alienation, *see Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258. Canons of construction "rooted in the unique trust relationship between the United States and the Indians" apply in interpreting treaties and statutes involving Indians. *Id.* at 247, 105 S.Ct. at 1258. Treaties must be given a liberal construction in favor of the Indians. *Id.* Ambiguous provisions must be interpreted to the benefit of the Indians. *Id.* An abrogation of Indian treaty rights will not be found absent explicit language. *Id.*

In keeping with the strong policy of the federal government to protect Indian lands, once an Indian tribe makes out a prima facie case of prior possession or title to the property in dispute, the burden of proof rests upon the non-Indian to demonstrate otherwise. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668-69, 99 S.Ct. 2529, 2538-39, 61 L.Ed.2d 153 (1979) (citing 25 U.S.C. § 194). The burden of proof thus shouldered by the non-Indian questioning Indian title

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[8] Beginning in 1871 Indian tribes were no longer dealt with by treaty, but solely by legislative act. Stephens v. Cherokee Nation, 174 U.S. 445, 483, 19 S.Ct. 722, 736, 43 L.Ed. 1041 (1899) (quoting 16 Stat. 544 § 2079). The legislation that ended Indian treaty-making provided that prior treaties remained valid. Id.

encompasses both the burden of producing evidence and the burden of persuasion. *Id.*

**C. *Analysis***

As the motion and cross-motion for summary judgment turn on a determination of the Indian Country status of the properties, a separate analysis of each will not be undertaken. Rather, the Indian Country status will be analyzed, then the implications of that determination upon each motion will be evaluated.

Sherrill argues that the properties in issue are not Indian Country because they (1) were purchased in private transactions; (2) were not purchased from the federal government; (3) have not been set aside by the federal government for Indian use; (4) are not superintended by the federal government; and (5) receive services not from the federal government, but rather from Sherrill. Oneida Ltd., the Counties, and New York State, as amici curiae, argue that the Reservation was disestablished or diminished by the 1838 Treaty of Buffalo Creek and therefore the properties are not Indian Country.

The Nation argues that the properties are within its aboriginal lands and within the Reservation guaranteed by the 1794 Treaty of Canandaigua. The Nation further argues that the Reservation was not disestablished or diminished and therefore the properties in issue are Indian Country. The Nation does not contend that the properties constitute a dependent Indian community pursuant to 18 U.S.C. § 1151(b), or Indian allotment pursuant to 18 U.S.C. § 1151(c).

The arguments of the parties thus turn on a determination of the reservation status of the properties, pursuant to 18 U.S.C.



§ 1151(a). This determination will answer the Indian Country and taxability inquiries, as previously noted.

The Oneidas' aboriginal lands encompassed six million acres of Central New York. *See Oneida II*, 470 U.S. at 230, 105 S.Ct. at 1249. The properties at issue are within the Oneidas' aboriginal lands. *Id.* (describing the extent of the Oneida land from the Pennsylvania border to the St. Lawrence River and from Lake Ontario to the Adirondack foothills). The Nation further relies upon the 1794 Treaty of Canandaigua and its expert's conclusion that the properties are within the Reservation confirmed by that Treaty.

The Treaties of Fort Stanwix and Fort Harmar designated the Reservation land. (First Carmen Aff. Ex. 3-4.) The 1788 Treaty of Fort Schuyler again designated the land reserved to the Oneidas. *Id.* Ex. 5. The Treaty of Canandaigua confirmed and guaranteed the Nation's right to occupy those Reservation lands. *Id.* Ex. 6. The properties are within the Reservation lands. (Thomas Decl. ¶ 10.) The properties were conveyed to one Cornelius Dockstader, an Oneida, in 1805. *Id.* at ¶ 11(b); First Carmen Aff. Ex. 8. Dockstader conveyed the lands to one Peter Smith in 1807. (Thomas Decl. Ex. 11(c); First Carmen Aff. Ex. 10.) Thereafter, the lands were conveyed to others until 1997 and 1998. (Thomas Decl. Ex. 11(d).)

Sherrill contends that these facts are in dispute. (See Sherrill Resp. L.R. 7.1 Statement.)[9] However, Sherrill has not set

[9] Local Rule 7.1(a) (3) provides

> Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to

forth competent evidence that raises a dispute as to these facts. For example, the Nation set forth the following as an undisputed fact: "The Nation's lands in Sherrill were part of the lands possessed by the Nation for centuries before this country was formed, often referred to as 'aboriginal' lands. Carmen Aff. at ¶ 6." (Nation L.R. 7.1 Statement.) Sherrill responded as follows: "Sherrill does not have sufficient information to admit or dispute paragraph 3." (Sherrill Resp. L.R. 7.1 Statement ¶ 3.) The Nation also set forth the following as an undisputed fact: "The Nation's lands in Sherrill were part of the Oneida reservation guaranteed and confirmed in the 1794 Treaty of Canandaigua. Carmen Aff. at ¶ ¶ 9-10, exh.6; Declaration of Paul A. Thomas, Jr., at ¶ 10." (Nation L.R. 7.1 Statement.) In response, Sherrill again stated: "Sherrill does not have sufficient information to admit or dispute paragraph 4." (Sherrill Resp. L.R. 7.1 Statement ¶ 4.) The Nation stated: "The reservation lands that the Nation now possesses in Sherrill were out of the Nation's possession from 1805 to 1997-1998. Carmen Aff. at ¶¶ 14-15, exhs. 8- 10." (Nation L.R. 7.1 Statement ¶ 9.) Sherrill responded: "Sherrill disputes paragraph 9. [The Nation] has no reservation land in Sherrill. See Sherrill Mem. at 14-16. Sherrill does not have sufficient information to admit or dispute the remaining content of paragraph 9." (Sherrill Resp. L.R. 7.1 Statement ¶ 9.)

As these responses demonstrate, Sherrill has not raised even a metaphysical doubt as to these material facts set forth by the Nation as undisputed. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. at 1356. Moreover, Sherrill has not set forth any additional facts as to which it contends a dispute exists. (*See* Sherrill Resp. L.R. 7.1 Statement.) Against the backdrop of these undisputed facts, the Indian Country analysis will be carried out.

The undisputed facts establish that the properties are within the Oneidas' aboriginal lands and within the Reservation confirmed by the 1794 Treaty of Canandaigua. The Nation has thus made a prima facie showing of prior possession and title to the properties. *See Omaha Indian Tribe*, 442 U.S. at 668-69, 99 S.Ct. at 2538 (finding that a showing that land was once occupied by the tribe as a reservation sufficient to constitute prima facie showing to raise 25 U.S.C. § 194 presumption). Sherrill must now offer sufficient evidence to show that the Oneidas are no longer entitled to possession of the properties or that it will prevail on its affirmative defenses.[10] *See id.* at 669, 99 S.Ct. at 2538.

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> interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.
>
> The opposing party shall file a response to the Statement of Material Facts. The non-movant's response shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises. The non-movant's response may also set forth any additional material facts that the non- movant contends are in dispute. Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.

Thus, in order to withstand a motion for summary judgment a party must specifically cite to the record for the evidence that raises a factual issue. L.R. 7.1(a) (3). Merely stating that a fact is in dispute, without citing to record evidence that raises a dispute, is insufficient. *See id.*

[10] While Sherrill initially did not assert affirmative defenses, the currently-pending motion to amend its answer seeks to add affirmative defenses. Accordingly, the proposed asserted defenses will be evaluated below in section IV.D.1.c.

Sherrill first argues that the Oneidas' right to possession of the properties derives from its fee title. Sherrill argues that the Oneidas' open market purchase of fee title is inconsistent with federal set aside and superintendence.[11] Sherrill cites *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998), in support of this argument. In *Venetie*, the Supreme Court explained its reliance in prior cases

> upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, dependent Indian communities, and allotments.

*Id.* at 530, 118 S.Ct. at 954 (internal citations omitted). *Venetie*, however, concerns whether nonreservation land constituted a dependent Indian community and therefore Indian Country. *Id.* at 527, 118 S.Ct. at 953 (holding that two requirements, set aside and superintendence, must be met for land that is neither a reservation nor an allotment to be considered a dependent Indian community). The land at issue had formerly been reservation land, but the reservation was revoked by the Alaska Native Claims Settlement Act. *Id.* The *Venetie* Court noted that before the amendment of Section 1151 to include dependent Indian community within the statutory definition of Indian Country, the Court had held in three cases that "Indian lands that were not reservations could be Indian [C]ountry." *Id.* at 528, 118 S.Ct. at 953. In

[11] It is unnecessary to evaluate Sherrill's arguments relating to dependent Indian community and Indian allotment, as the Nation does not contend that the properties constitute either classification.



those cases, the Court required a two pronged showing: federal set aside for the use of the Indians as Indian land and federal superintendence. *Id.* at 528-530, 118 S.Ct. at 953-54.

The *Venetie* Court explained that in *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), Pueblo Indian land held in fee simple by the Pueblo, restricted from alienation by the federal government, met the set aside and superintendence requirements and constituted Indian Country, although the land was not a formal reservation. *Id.* Similarly, the Court explained that in *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), allotted lands held in trust by the federal government for the benefit of individual Indians were Indian Country despite diminishment of the reservation. *Id.* The Venetie Court further explained that in *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938), it held that the set aside and superintendence requirements were met, where although the land was not a reservation it was held in trust for the Indians by the federal government and the government had authority to pass laws regulating the territory. *Id.* Thus, none of these cases holding that set aside and superintendence showings are prerequisites to qualify as Indian Country involved reservations.

The two-prong test set forth in *Venetie* does, however, parallel the test for establishing Indian Country status when the land in question is not a formal reservation, as set forth in *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511, 111 S.Ct. at 910. *Roberts*, 185 F.3d at 1133. In *Roberts*, property held in trust by the government for Indian benefit, found by the lower court to be validly set aside and under federal superintendence, was Indian Country. *Id.* In *Citizen Band Potawatomi Indian Tribe*, the land in question was held for the Indians in trust by the government. 498 U.S. at 511, 111 S.Ct. at 910. The Supreme Court found that the test for Indian Country does not depend upon the denomination of

the property as "trust land" or "reservation." *Id.* Accordingly, the trust land, which was validly set apart and subject to federal superintendence, "qualifie[d] as a reservation for tribal immunity purposes."[12] *Id.* at 511, 111 S.Ct. at 910.

It is apparent, therefore, that federal set aside and superintendence are required in order to find that an informal reservation is Indian Country under § 1151(a) and that nonreservation land is a dependent Indian community. What Sherrill has not cited, and what has not been found after exhaustive research, is any case in which federal set aside and superintendence were prerequisites to a finding that a valid, formal reservation was Indian Country. To the contrary, as the aforementioned review of cases shows, it appears that there is no such requirement for federal set aside and superintendence when the property in question is a formal reservation.

The *Venetie* Court noted that it "had also held, not surprisingly, that Indian reservations were Indian [C]ountry." 522 U.S. at 528 n. 3, 118 S.Ct. at 953 n. 3. *Venetie* therefore supports the Nation's view that the set aside and superintendence requirements are inherent to a validly established reservation, and need not be separately proven to support a finding that a reservation is Indian Country. *See id.* at 528 & n. 3, 118 S.Ct. at 953 & n. 3; *Donnelly v. United States*, 228 U.S. 243, 269, 33 S.Ct. 449, 458, 57 L.Ed. 820 (1913) (stating that "in our judgment, nothing can more appropriately be deemed 'Indian [C]ountry,' ... than a tract of land ... lawfully set apart as an Indian reservation").

Accordingly, Sherrill's argument that the properties are not Indian Country because federal set aside and superintendence

[12] The issue in the case was whether the state could impose sales tax on sales made by Indians to Indians and non-Indians on tribal trust lands. Id. at 507, 111 S.Ct. at 908.



have not been shown fails. The federal government confirmed and guaranteed the Oneidas' Reservation by the Treaty of Canandaigua in 1794. Federal set aside and superintendence are inherent in that Reservation. Thus, even if it is said that such requirements apply, however doubtful that is in the case of formal reservations, then those requirements are met at the time the reservation is established. In this case, therefore, the federal set aside and superintendence requirements were met as of 1794.

Additionally, to the extent that the argument contends that fee simple title to land precludes Indian Country status it also fails. The Supreme Court has found that Indian Country status is not precluded because the Indians hold fee simple title to land. *See Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6 (rejecting argument that Indian Pueblo lands, held in fee simple by the Pueblo, cannot be Indian Country due to the fee simple title).

In reply, Sherrill extends its argument citing the ruling of April 11, 2001 (McCurn, J.), that the remedy of ejectment of current title-holders of the land that it claims is not available to the Nation. Sherrill argues that this holding, that the Nation does not have a current possessory right to the land claimed, defeats any claim it has to possession of the lands prior to purchase of fee title. Thus, Sherrill contends, the Nation cannot establish Indian title to the land or that the properties are reservation land or Indian Country.

Sherrill's argument ignores the basis for the land claim action: denial of the Nations' ancestral possessory right to the land. The argument also ignores the question upon which Judge McCurn's ruling was made: what remedies might be available to the Nation should it prove its wrongful dispossession claim. *See Oneida Indian Nation*, 199 F.R.D. at 90. The parameters of the ruling are clear: "To the extent that the Oneidas in this particular case eventually may be

able to establish that they have possessory rights in the claim area, such rights do not necessarily encompass the concomitant right to obtain relief directly from the current landowners." *Id.* This ruling, therefore, does not limit the Nations' pursuit of claims to possessory rights to the land. Accordingly, it does not estop the Nation from asserting ancestral possessory rights in the properties at issue here, nor does it negate the existence of a reservation. To the contrary, the ruling recognizes the Nations' right to pursue claims of possessory rights to its ancestral lands. *Id.*; *see also Oneida II*, 470 U.S. at 236, 105 S.Ct. at 1252 (holding "that the Oneidas can maintain this action for violation of their possessory rights based on federal common law."). The Supreme Court, while recognizing the Oneidas' possessory rights claim, left open whether equitable considerations might limit the available relief. *Oneida II*, 470 U.S. at 254 n. 27, 105 S.Ct. at 1262 n. 27. Judge McCurn's ruling did not foreclose the Oneidas' possessory claim; rather, he limited the relief available by foreclosing the possibility of ejectment of current landowners in the land claim area and recovery of monetary damages from current landowners. *See Oneida Indian Nation*, 199 F.R.D. at 90-94.

Also in reply Sherrill argues that the Reservation has been diminished. Sherrill contends that factors such as subsequent treatment and the pattern of settlement in the area in question must be considered in deciding whether a reservation has been diminished, in addition to congressional action. Sherrill cites *Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, and *Solem*, 465 U.S. 463, 104 S.Ct. 1161, in support of this argument. Sherrill concedes that as surplus land act cases, these cases may not be "directly pertinent" here. (*See* Sherrill Reply Mem. at 4 n. 4, 17 n. 12.) However, Sherrill avers that the cases contradict the Nation's assertion that only congressional action may diminish a reservation. This averment is incorrect. In fact, only congressional action may diminish or disestablish a reservation. 25 U.S.C. § 177;



*Cayuga Indian Nation*, 667 F.Supp. at 944 (citing *Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258); *Narragansett Indian Tribe*, 89 F.3d at 914.

The surplus land act cases involved interpretation of congressional acts.[13] *See, e.g., Yankton Sioux Tribe*, 522 U.S. at 343-344, 118 S.Ct. at 798; *Solem*, 465 U.S. at 464, 104 S.Ct. at 1163; *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 111, 118 S.Ct. 1904, 1908, 141 L.Ed.2d 90 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585-86, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 427-28, 95 S.Ct. 1082, 1084, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 2254, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354, 82 S.Ct. 424, 426, 7 L.Ed.2d 346 (1962). For example, in *Yankton Sioux Tribe* the Supreme Court stated: "Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." 522 U.S. at 343, 118 S.Ct. at 798. The Court further stated that "although the most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands, we have held that we will also consider the historical context surrounding the passage of the surplus land Acts, and to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there." *Id.* at 344, 118 S.Ct. at 798 (internal quotations omitted).

It is thus clear that evaluation of the subsequent treatment and the pattern of settlement is relevant only where needed to determine congressional intent. Where, as here, there is no congressional act, congressional intent is irrelevant and the

[13] The acts allotted Indian lands to individual Indians or to the tribe for common tribal purposes, and opened unallotted lands to white settlers.

subsequent treatment and the pattern of settlement are also irrelevant.

Sherrill, joining the amici curiae, argues that the 1838 Treaty of Buffalo Creek, a purported act of Congress, disestablished the Reservation. Oneida Ltd., the Counties, and New York State, as amici curiae, develop this argument. First Oneida Ltd. contends that the Treaty of Buffalo Creek plainly and unambiguously disestablished the Reservation. It next contends that even if the Treaty of Buffalo Creek is determined to be ambiguous, the contemporary historical context; subsequent congressional and administrative references to the reservation from the time of the claimed disestablishment until the present; historic demographic trends; the jurisdictional history of federal, state, and tribal exercises of sovereignty over the lands in dispute; and the justifiable expectations of the people living in the area are relevant and lead to the conclusion that the Reservation no longer exists.

The 1838 Treaty provided for the removal of several tribes of New York Indians from their lands in Wisconsin to territory west of the Mississippi River in what is now the State of Kansas. 7 Stat. 550. The Treaty created a reservation for the tribes in Kansas. *Id.* Art. 2. A relatively small piece of land was reserved for them in Wisconsin, while the Indians ceded the majority of their Wisconsin lands to the federal government. *Id.* Art 1. A small payment was to be made to the tribes upon their relocation to Kansas. *See New York Indians*, 170 U.S. at 3, 18 S.Ct. at 531-32. In addition to other provisions not relevant here, the Treaty provided for a payment to Oneidas still residing in New York for "expenses incurred and services rendered" by the Oneidas in securing the Wisconsin reservation.[14] 7 Stat. 550 Art. 13. Moreover,

[14] This provision was presumably included because the New York Oneidas would no longer be able to take advantage of payments previously guaranteed upon their removal to the



the New York Oneidas "agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida [New York]." *Id.*

It is the removal language that Oneida Ltd. argues plainly and unambiguously disestablished the Reservation. It argues that in every disestablishment or diminishment case of which it is aware, the tribe was permitted to remain on at least a part of the reservation, and in fact, it was anticipated that some members of the tribe would remain on the prior reservation land. Under this removal treaty, however, it argues that the Oneidas still residing in New York were obligated to remove from New York. Accordingly, Oneida Ltd. argues that this obligation to remove clearly terminated the New York Reservation. It argues that to hold otherwise would be contrary to the historical concept of removal.

An obligation to remove does not constitute abandonment of tribal sovereignty over the land from which the Indians are to remove, contrary to the arguments of Oneida Ltd. Rather, the actual language of the congressional act in question, in this case the Treaty of Buffalo Creek, must clearly and unambiguously indicate the intent to disestablish or diminish the reservation. *Cayuga Indian Nation*, 667 F.Supp. at 944 (citing *Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258).

Specific cession language has been required in order to make a finding of reservation diminishment. For example, language that the tribe would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and

Wisconsin reservation, which was significantly diminished by the Treaty of Buffalo Creek. In other words, since removal to Wisconsin was no longer a possibility for the New York Oneidas, reimbursement was being made for costs incurred by them in obtaining the Wisconsin reservation.

interest in and to all the unallotted lands" terminated reservation status. *Yankton Sioux Tribe*, 522 U.S. at 344, 118 S.Ct. at 798. The Court distinguished cases in which the language did not indicate a clear intent to diminish a reservation. Thus, where acts "declar[ed] surplus land 'subject to settlement, entry, and purchase' " congressional intent to diminish the reservation was not found. *Id.* at 345, 118 S.Ct. at 799 (quoting *Seymour*, 368 U.S. at 355, 82 S.Ct. at 426-27; *Mattz*, 412 U.S. at 501-02, 93 S.Ct. at 2256-57). The Court also refused to "read a phrase authorizing the Secretary of the Interior to 'sell and dispose' of surplus lands" as cession language. *Id.* (quoting *Solem*, 465 U.S. at 472, 104 S.Ct. at 1167.)

In contrast to the cession language in *Yankton Sioux Tribe*, the Treaty of Buffalo Creek simply states an agreement to remove to Kansas. The language of Article 13 cannot be read as clearly and unambiguously ceding the Oneidas' New York lands. *See* 7 Stat. 550 Art. 13; *Yankton Sioux Tribe*, 522 U.S. at 344, 118 S.Ct. at 798. To the contrary, the language clearly and unambiguously is not cession language. *See Yankton Sioux Tribe*, 522 U.S. at 344-45, 118 S.Ct. at 798-99. Further, the Supreme Court has found that a fixed payment in "sum certain" language adds credence to cession language. *Id.* at 344, 118 S.Ct. at 798. In Article 13, no payment is provided; rather, the removal was only to take place "*as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.*" 7 Stat. 550 Art. 13 (emphasis added). This language in no way bolsters the removal language to make it reflect any intent to disestablish the Reservation. There clearly is no "total surrender of tribal claims in exchange for a fixed payment" in the Treaty of Buffalo Creek related to the Oneidas' New York lands. *See Yankton Sioux Tribe*, 522 U.S. at 345, 118 S.Ct. at 799.



Also instructive is the reasoning in *New York Indians*. In that case the Supreme Court evaluated the Treaty of Buffalo Creek language to determine if it reflected an intent for the Indians to forfeit the Kansas reservation if they failed to remove there. 170 U.S. at 24-25, 18 S.Ct. at 536-37. The Court determined that the use of present tense in the granting clause meant that an immediate interest in the land was conveyed. *Id.* at 17, 18 S.Ct. at 534. The Court analyzed the cession language pertaining to the Wisconsin lands; the specific description of the Kansas lands that were to become the new reservation; the language of the habendum clause; the special provision for the New York Senecas and the sale of their land in New York; the set off of land for the Tuscaroras and the conveyance of trust land to be held for them; and determined that present title in the Kansas lands was conveyed. *Id.* at 19-21, 18 S.Ct. at 535. Because title passed to the Indians at the time the Treaty was made, a mere failure to assert title did not work a forfeiture of the title. *Id.* at 34, 18 S.Ct. at 540. Accordingly, the Court directed that a judgment be entered for the amount received by the government when it sold the lands. *Id.* at 36, 18 S.Ct. at 541.

Notably, the Supreme Court made a painstaking analysis of the Treaty of Buffalo Creek, specifically detailing its provisions. *Id.* at 15-21, 18 S.Ct. at 533-35. The Court evaluated the divestiture of New York lands by the Senecas, in Article 10, and the set off in trust of New York lands for the Tuscaroras, in Article 14. *Id.* at 21, 18 S.Ct. at 535. In discussing these articles, the Court stated: "These proceedings, by which these tribes devested themselves of their title to lands in New York" indicated the intent for the tribes to take immediate possession of the Kansas lands. *Id.* Of importance is the Court's failure to mention that any Oneida New York land was devested by this Treaty. *See id.* If Article 13 in fact worked a devestiture of the Oneidas' New York lands, it stands to reason that the Supreme Court

would have mentioned that fact when performing this detailed analysis.

The only mention of Article 13 by the Court is in a discussion of the possibility that even if a forfeiture occurred by executive action, the contingency (Indians failing to agree to remove) to affect the forfeiture had never occurred. *Id.* at 25-26, 18 S.Ct. at 537. In other words, forfeiture was conditioned "not upon the actual removal ... to Kansas," but rather upon agreement to remove. *Id.* at 26, 18 St. Ct. at 537. The Court cited Article 13 as signifying the Oneidas' agreement to remove, thus technically performing the condition precedent. *Id.*

Oneida Ltd. argues that no court has found tribal sovereignty surviving an obligatory removal treaty, and contends that to do so would "logically open up over 100 million acres of lands east of the Mississippi River" to claims of "ongoing tribal sovereignty, jurisdiction, and regulatory authority over the lands, waters, natural resources, and peoples within these areas." (Oneida Ltd. Mem. at 15.) It is this type of contention that "engenders inflamed passions on all sides." *Oneida Indian Nation*, 199 F.R.D. at 65. Moreover, the contention is baseless. It has been determined that ejectment, or in other words recovery of actual possession, of the Reservation lands is not a viable remedy in the Oneidas' land claim action. *Id.* at 90. It may be that courts would also determine that such a remedy is not viable in similar suits in other areas. It is also well settled that tribal jurisdiction is limited to Indians and Indian land, and the state retains jurisdiction over non-Indians and land which is not Indian Country. *See Sac & Fox Nation*, 508 U.S. at 128, 113 S.Ct. at 1993; *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 513, 111 S.Ct. at 911. Further, non- Indian communities even within the boundaries of a reservation are not Indian Country, *Weddell v. Meierhenry*, 636 F.2d 211, 213 (8th



Cir.1980), so there would be no dispute over applicable jurisdiction.

Oneida Ltd. cites *Menominee Indian Tribe v. Thompson*, 161 F.3d 449 (7th Cir.1998), in support of its contention that obligatory removal treaties always extinguish rights to the lands from which the Indians agree to remove. The Menominee Tribe ceded their lands around the Fox River in Wisconsin by treaty in 1831. *Id.* at 458. The 1831 Treaty also preserved the Menominees' right to fish and hunt on certain portions of the ceded land, without interference or regulation by the state. *Id.* In 1848 the Tribe entered into another treaty, ceding all of its lands in Wisconsin, obtaining new lands in Minnesota, and agreeing to remove to Minnesota. *Id.* The court found that the Menominees had unambiguously ceded all of its Wisconsin land, including the previously reserved rights to hunt and fish near the Fox River. *Id.* at 457-58. In following the canon of construction that treaties must be interpreted as the Indians would have understood them, the court noted that the Menominees "could not reasonably have expected to continue hunting and fishing on the land ceded in 1848, considering the Tribe had just agreed to leave the Wisconsin land and move to the Minnesota reservation approximately 300 miles away." *Id.* at 458.

The cession language in the Menominees' 1848 Treaty, "agree to cede, and do hereby cede, sell, and relinquish to the United States all their land in the State of Wisconsin wherever situated," was clear and unambiguously reflected an intent to relinquish all rights to the Wisconsin land. *Id.* In contrast, the Treaty of Buffalo Creek language, "agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida," contains no cession language. Accordingly,

*Menominee Indian Tribe* is not helpful to Oneida Ltd.'s argument.

More closely analogous are *New York Indians* and *Donnelly*. In *New York Indians*, the Supreme Court found that the New York Indians' refusal to remove to the new territory did not devest them of the rights to the new reservation. 170 U.S. at 34-35, 18 S.Ct. at 540-41. In *Donnelly*, it was argued that creation and maintenance of a school district on a reservation changed the status of the land. 228 U.S. at 267, 33 S.Ct. at 457. The Supreme Court found that the existence of the county school district had no significance in its evaluation of Indian Country status. *Id.* at 267-68, 33 S.Ct. at 457. Here, an agreement to remove cannot be construed as relinquishment of rights in land.

Even if the Treaty of Buffalo Creek is considered an obligatory removal treaty, absent cession language it cannot be construed as ceding the Nation's New York lands. *See, e.g., Yankton Sioux Tribe*, 522 U.S. at 344, 118 S.Ct. at 798; *see also Menominee Indian Tribe*, 161 F.3d at 458 (interpreting "to cede, and do hereby cede, sell, and relinquish" as clearly ceding lands). Lacking cession language, the Treaty of Buffalo Creek unambiguously did not disestablish the Reservation. In other words, the Treaty of Buffalo Creek did not alter the reservation status of the Oneidas' New York lands. Even if the Treaty of Buffalo Creek language could possibly be considered ambiguous as to intent to affect the Oneidas' New York lands, according to the well-settled canons of construction such ambiguity must be resolved in favor of the Indians. *Oneida II*, 470 U.S. at 247, 105 S.Ct. at 1258. Further, a finding of disestablishment or diminishment must not be lightly implied. *Id.* at 248, 105 S.Ct. at 1258. Thus, with the applicable canons of construction in mind, the language of the Treaty, even if ambiguous, must be construed to have intended no disestablishment of the Oneidas' New York lands.



The amici curiae, however, argue that if the Treaty of Buffalo Creek is not considered an unambiguous relinquishment of the Reservation, then it should be considered ambiguous as to that issue. The amici then point to the force of time and law in an attempt to find congressional intent to disestablish or diminish the Reservation. Given that the unambiguous language of the Treaty clearly does not indicate relinquishment of the New York land, it would not be proper to rely upon demographics and jurisdictional history to find disestablishment. *Hagen v. Utah*, 510 U.S. 399, 440-41, 114 S.Ct. 958, 980, 127 L.Ed.2d 252 (1994) (Blackmun, J., dissenting) ("Absent other plain and unambiguous evidence of a congressional intent, we never have relied upon contemporary demographic or jurisdictional considerations to find diminishment."). To find that the historical context and demographics indicate congressional intent to disestablish the Reservation with absolutely no language whatsoever in the Treaty that could possibly be read to infer such intent flies in the face of the law, as well as logic and common sense. Here, the Treaty language is not ambiguous and therefore considering historical context and demographics is not warranted.

However, several arguments of the amici deserve mention. Oneida Ltd. posits that historical, equitable, and practical concerns require a finding against the Nation. It seems that this argument calls for ignoring the law and succumbing to political pressures. As noted above, it is in the purview of the executive and legislative branches, not the judiciary, to make such determinations. *See Cherokee Nation*, 174 U.S. at 483, 19 S.Ct. at 736.

Oneida Ltd. further suggests that a finding in favor of the Nation would upset the justifiable expectations of 70,000 non-Indian residents in the area. As previously noted, such scare tactics will be to no avail in this forum. Moreover, they

are groundless, as any decision rendered in this action will apply narrowly to the parcels at issue in the lawsuit, which are currently possessed by the Nation. If a finding is made that those parcels constitute a viable reservation and are Indian Country, then by definition they are inalienable by the Nation without the approval of the federal government. (*See* First Carmen Aff. Ex. 12-15.) Tribal jurisdiction will apply only on the parcels affected by the decision. Further, any decision rendered here will apply to the Nation and not to any private landowners.

Amici present statistics and evidence to show that historically for many years the state has asserted jurisdiction over the area and the area is populated by many non-Indians and few Indians. This evidence is set forth to support the argument that the force of time and law has *de facto* diminished the Reservation. The Supreme Court has recognized that although settlement by non-Indians may degrade the Indian character of a reservation, that is not necessarily determinative of whether the reservation status of the lands has changed. *See Yankton Sioux Tribe*, 522 U.S. at 336, 118 S.Ct. at 804.

The reliance on this historical data also exhibits logical faults. Out of aboriginal lands of six million acres, the Reservation originally created consisted of 300,000 acres. Approximately 100,000 acres were illegally purchased by New York State in 1795. *See Oneida II*, 470 U.S. at 229-33, 105 S.Ct. at 1249-50. Approximately twenty-five other allegedly illegal purchases are at issue in the land claim litigation.

First, by the time of the 1838 Treaty of Buffalo Creek, the Oneidas only retained 5,000 acres. To say, as Sherrill and the amici wish, that the 1838 Treaty disestablished a reservation of 300,000 acres, when at the time the Oneidas entered into the Treaty they possessed only 5,000 acres,



defies logic. How possibly could those Oneidas have intended to relinquish their rights to 295,000 acres when they did not know they had such rights?

Second, the Oneidas had been dispossessed of most of their land, they claim illegally, by the time periods for which demographic and jurisdictional evidence is presented. The reason that non-Indians settled on the land and the state asserted jurisdiction was because the Oneidas had been dispossessed, possibly illegally. How can this be considered as evidence of congressional intent to disestablish the Reservation?

Another argument is that the federal policy at the time, 1838, was to remove the Indians from the east to the territories in the west. This policy, New York State argues, supports the construction of the Treaty of Buffalo Creek as a whole to reflect the intent to disestablish the Oneidas' New York Reservation. However, reading the Treaty as a whole indicates that when there was an intent to cede land, the language clearly so stated. For example, Article 1, in reference to the Wisconsin reservation previously acquired for the New York Indians from the Menominees, states that the Indians "cede and relinquish to the United States all their right, title and interest to the lands" in Wisconsin. 7 Stat. 550 Art. 1. Article 2 provides the consideration for the cession of Article 1. *Id.* Thus, had the parties to the Treaty of Buffalo Creek intended a cession of the Oneida land in New York, the language to use to do so was known to them and at their disposal. *See Mattz*, 412 U.S. at 504 & n. 22, 93 S.Ct. at 2257-58 & n. 22 (discussing examples of clear language of express termination). Moreover there is no legal authority for interpreting a treaty as relinquishing rights to Indian lands based solely on federal policy, in the complete absence of cession language in the treaty.

New York State relies upon *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), in support of the argument that jurisdictional conflicts between the state and tribal authorities was a problem that the removal policy sought to eliminate. In *Worcester*, the Supreme Court found that the Cherokee Nation maintained sovereignty over its peoples and lands, and that Georgia's assertions of jurisdiction in contravention of such sovereignty were void. *Id.* 31 U.S. at 561. The Court reasoned that the Constitution, in conferring upon Congress the power of making treaties and regulating commerce with the Indian tribes, left the sole right of dealing with the Indians in the federal government, thereby precluding a state from unilaterally asserting jurisdiction over the Indians. *Id.* at 558-61. The Court noted that the states

> acquiesc[ed] in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States.

*Id.* at 560. New York State reasons from *Worcester* that, as reservation status and jurisdiction went hand in hand, by obligating the Oneidas to remove from New York, there was an intent to terminate tribal jurisdiction and thereby disestablish the Reservation. This argument and reasoning completely ignores the message of *Worcester* that only the federal government has the authority to terminate the tribal jurisdiction and disestablish a reservation. It ignores all of the canons developed by the Supreme Court for making determinations of congressional intent when dealing with Indians, such as requiring plain and unambiguous expression



of intent to terminate Indian title. *See, e.g., Oneida II*, 470 U.S. at 247-48, 105 S.Ct. at 1258. It ignores the overriding federal policy of protecting the Indians and their lands. *See, e.g., id.*

> These Indian tribes are the wards of the nation.... From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.... The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.

*United States v. Wright*, 53 F.2d 300, 305 (4th Cir.1931) (quoting *United States v. Kagama*, 118 U.S. 375, 383-85, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 (1886)). It also ignores the simple definition of remove. Remove does not mean terminate.

In sum, the Nation has set forth undisputed evidence that the 1794 Treaty of Canandaigua confirmed and guaranteed its Reservation, which encompasses the lands at issue here. There is no evidence of any congressional act that disestablished the Reservation between 1794 and the present day. Accordingly, this land is Indian Country and is not taxable by Sherrill and the Counties.

**D.** ***Application of Indian Country Finding***

**1.** ***Lead Case***

**a.** ***Sherrill's Motion for Summary Judgment or Alternative Injunctive Relief***

Sherrill contends it is entitled to summary judgment solely based upon the properties at issue being found not to be Indian Country pursuant to § 1151. Because it has been found that the properties are Indian Country, Sherrill's motion for summary judgment must be denied.

In the alternative Sherrill seeks a preliminary injunction maintaining the status quo ante. Sherrill wishes to enjoin the Nation from purchasing additional properties or expanding the properties it currently owns.

A preliminary injunction should issue only where the party seeking such relief shows "that it is likely to suffer irreparable injury if relief is denied [and] also that there is either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the [movant's] favor." *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 118 (2d Cir.1984); *Otokoyama Co. v. Wine of Japan Import*, Inc., 175 F.3d 266, 270 (2d Cir.1999).

Sherrill argues that absent an injunction it is in imminent danger of losing its tax base and its power to govern the property owners within the City. Sherrill posits irreparable harm will result from its inability to collect property tax or sales tax from the businesses already operated by the Nation, and from it being forced to provide municipal services to homes and business that do not contribute to the tax base.



The Counties, as amicus curiae, also contend that absent injunctive relief harm will be irreparable. The Counties assert that the Nation's purchases of land are accelerating, it having purchased 13,000 acres since 1987. As the Nation acquires more land, the tax base shrinks. The Counties argue that the resulting shortfalls in tax revenue will cause deficiencies in public services to the citizenry, including law enforcement, emergency services, and highway maintenance. The Counties further claim harm from the Nation's assertion of sovereignty over the land, asserting that irreparable damage to the body politic will result from a checkerboard jurisdictional pattern.

Both Sherrill and the Counties contend that, additionally, the harm is irreparable because the Nation's sovereign immunity will insulate it from any claim for damages in the future. While this may be true, it is irrelevant unless Sherrill can establish harm.

Sherrill's contention that it is on the verge of extinction is exaggerated. Sherrill has had budget surpluses for the last five years. (First Carmen Aff. Ex. 31.) Sherrill retorts that each year its surplus becomes less and less. Sherrill's financial condition is not indicative of being on the brink of bankruptcy, and is not supportive of a claim of irreparable harm.

Also failing to establish irreparable harm are the arguments made by Sherrill and the Counties that the fact that Nation land does not contribute to the tax base causes deficiencies in services such as law enforcement and fire protection. First, neither Sherrill nor the County cites to a particular instance, or even to general circumstances, where some budget shortfall caused by the Nation's refusal to pay property tax resulted in failure by the municipalities to provide municipal services. Second, over $30 million worth of Sherrill property is tax exempt, not including the Nation property at issue here,

which may account for some budget shortfall. (First Carmen Aff. Ex. 32.)

Sherrill has not adequately shown irreparable injury in order to entitle it to preliminary injunctive relief. *See Otokoyama Co.*, 175 F.3d at 270. Further, based upon the foregoing finding that the properties are Indian Country, Sherrill has failed to show a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in Sherrill's favor. *See id.* Accordingly, Sherrill's request for alternative preliminary injunctive relief must be denied.

**b. *Nation's Cross-motion for Summary Judgment***

The Nation cross moves for summary judgment on its taxation claim, its due process claim, and Sherrill's counterclaims against it.

**(1) *Taxation Claim***

The basis for the Nation's taxation claim is that the property is Indian Country and therefore is not taxable. Based upon the finding that, as a matter of law, the properties at issue are Indian Country and thus are not taxable, the Nation is entitled to judgment on that claim.

Sherrill argues that summary judgment cannot be granted in favor of the Nation, as it rests upon a number of disputed factual assertions, for which additional discovery is required. Sherrill suggests that at dispute are (1) whether the properties are within the Reservation boundaries confirmed by the Treaty of Canandaigua; (2) circumstances regarding transfers of the properties from 1794 until the present day including possible federal governmental approval; (3) whether the 1805 and 1807 transactions referenced by the



Nation actually encompasses the properties; (4) whether the Nation has maintained continuous tribal status since 1794, for the purposes of the Nonintercourse Act; (5) the circumstances surrounding the government's alleged recognition of land referenced in the Carmen Aff. Ex. 13-15; (6) whether the Nation's claim is factually barred by laches, estoppel, waiver, statute of limitations, unclean hands, or consent; (7) whether there was ratification of transfers that the Nation claims are invalid; and (8) whether the 1838 Treaty of Buffalo Creek or other treaties extinguished the 1794 Reservation. Sherrill relies upon Fed R. Civ. P. 56(f), which provides

> *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The documents and depositions into which Sherrill posits that it needs additional discovery point out the illusorious nature of its contention that discovery is now required on these points. For example, Sherrill avers that it needs discovery of documents and expert depositions relating to whether the proprieties are within the 1794 Treaty boundaries. (Sacks Aff. ¶ 4.) Any such documents are a part of the public record and thus readily available for Sherrill to cite in opposition to the Nation's cross motion. It is also notable that the Nation adduced expert evidence that in fact the properties are within the 1794 Treaty boundaries. (*See* Thomas Decl.) Sherrill also avers the need for discovery of documents and expert depositions relating to whether Congress has ratified or otherwise modified, eliminated, or terminated the 1794 Treaty. (Sacks Aff. ¶ 4.) The Congressional Record is and

has been available for Sherrill to determine if Congressional action regarding the Reservation has occurred since 1794. Permitting it further discovery into these areas would not be permissible pursuant to Rule 56(f), as such discovery was available prior to the time the motion was briefed.

Sherrill further contends that it requires discovery regarding the 1805 and 1807 transfers of the properties in question. (Sacks Aff. ¶ 5.) The Nation has adduced evidence that these transfers did involve the properties in question. (*See* Thomas Decl.) In order to withstand summary judgment on this point, Sherrill must do more than conclusorily assert the need to look for additional documentation on these transfers. In a similar manner Sherrill contends that it needs additional discovery to determine whether the Nation in fact has enjoyed continuous tribal status since 1794, a prerequisite for protection of the Nonintercourse Act. (Sacks Aff. ¶ 7.) However, Sherrill has adduced no facts to indicate that the Nation has not enjoyed such status, in the face of significant factual support in favor of the Nation's continued tribal status. Sherrill in no way indicates the reason for its failure to adduce opposing facts, nor how any delay would help it to do so. For example, Sherrill does not state what documents, nor even what type of documents, may provide facts that would create a question as to whether the Nation has maintained continuous tribal status. In a similar manner Sherrill fails to state a reason for its failure to have other facts available that are essential to its opposition.

Sherrill does mention what it considers an inadequate response to interrogatories posed to the Nation. (Sacks Aff. ¶ 12.) However, Sherrill does not include a reference in the record to the interrogatories and responses such that they could be considered in determining what additional discovery may be warranted by any inadequate responses. *Id.* Additional discovery pursuant to Fed.R.Civ.P. 56(f) is not warranted in these circumstances.



**(2) *Due Process Claim***

In its due process claim the Nation avers that the original notice of the tax delinquency and potential tax sale was insufficient in that it did not identify specific parcels that were to be subject to tax sale, and that newspaper publication of the redemption period was insufficient because it was not personal service and it was not timely. Further, the Nation argues that personal notice served on the Nation a short time before the expiration of the redemption period was untimely. In opposition, Sherrill contends that the Nation had ample actual notice of the foreclosures and sales, and that the Nation did not have and will not have in the future any intention of paying the assessed taxes or redeeming the properties.

Due process requires that notice of a tax sale be mailed to a property owner whose name and address are known. *McCann v. Scaduto*, 71 N.Y.2d 164, 176, 524 N.Y.S.2d 398, 519 N.E.2d 309 (N.Y.1987). Notice by publication is insufficient. *Id.* at 175-76, 524 N.Y.S.2d 398, 519 N.E.2d 309. Notice by mail of a redemption period is also required. *Yagan v. Bernardi*, 256 A.D.2d 1225, 1226, 684 N.Y.S.2d 117 (4th Dep't 1998). Providing notice by mail closer to the expiration period than the regulatory scheme provides does not comport with due process. *Id.*; *McCann*, 71 N.Y.2d at 177-178, 524 N.Y.S.2d 398, 519 N.E.2d 309. The notice must sufficiently describe the property such that the property can be found. *Kiamesha Dev. Corp. v. Guild Props.*, Inc., 4 N.Y.2d 378, 387, 175 N.Y.S.2d 63, 151 N.E.2d 214 (N.Y.1958). A description which permits identification and location of the property with reasonable certainty is adequate. *S.A.B. Enters., Inc. v. Stewart's Ice Cream Co.*, 187 A.D.2d 875, 876, 590 N.Y.S.2d 568 (3d Dep't 1992). Finally, "the nature of tax sales is such that the owner's title should not be divested unless the statutory requirements are 'strictly

observed.' " *Kiamesha Dev. Corp.*, 4 N.Y.2d at 389, 175 N.Y.S.2d 63, 151 N.E.2d 214 (quoting *Helterline v. People*, 295 N.Y. 245, 251, 66 N.E.2d 345 (1946)).

On August 7, 1997, Sherrill mailed to the Nation three notices of tax delinquency. (First Carmen Aff. Ex. 17.) None of the three notices specified any description whatsoever of properties to which the delinquencies pertained. *Id.* Such notices, with no description of the property affected, do not provide due process. *See Kiamesha Dev. Corp.*, 4 N.Y.2d at 387, 175 N.Y.S.2d 63, 151 N.E.2d 214; *S.A.B. Enters., Inc.*, 187 A.D.2d at 876, 590 N.Y.S.2d 568. Sherrill published a notice of tax sale for these properties; however, it did not provide notice to the Nation of the impending sale. The tax sale was held on November 5, 1997. According to the Sherrill Charter, a two-year redemption period would follow the tax sale. Sherrill's notice by publication in November 1999, of the upcoming February 8, 2000, expiration of the redemption period, was untimely. On January 10, 2000, Sherrill personally served notice on the Nation of the expiration of the redemption period. The one-month notice of the expiration of the redemption period is insufficient to comport with due process. *See McCann*, 71 N.Y.2d at 177-178, 524 N.Y.S.2d 398, 519 N.E.2d 309; *Yagan*, 256 A.D.2d at 1226, 684 N.Y.S.2d 117. Similarly, Sherrill's notices to the Nation on March 6, 2000, of impending redemption period expiration dates of November 5, 2000, and November 10, 2000, failed to provide the Nation due process. *See McCann*, 71 N.Y.2d at 177- 178, 524 N.Y.S.2d 398, 519 N.E.2d 309; *Yagan*, 256 A.D.2d at 1226, 684 N.Y.S.2d 117.

Sherrill cites *Greaney v. Springer*, 266 A.D.2d 707, 701 N.Y.S.2d 450 (3d Dep't 1999), in support of its argument that because the Nation actually knew of the foreclosures and tax sales, technical deficiencies in Sherrill's notice to the Nation should not render the tax sales invalid. In *Greaney*,



the plaintiffs argued that notices received in 1993 and 1994 were legally insufficient because there was no mention of a sale. 266 A.D.2d at 708. The *Greaney* Court found this argument meritless because plaintiffs had indisputably been given notice of the impending sale in 1996. *Id.* The plaintiff's argument that lack of a specific sale date on the 1996 notice rendered the notice invalid was also rejected, because the sale was actually postponed, at plaintiffs' request, for approximately seven months to afford them a chance to pay the delinquency before the sale. *Id.*

*Greaney* is distinguishable on two grounds. First, the technical deficiencies, rejected as a basis for setting aside the tax sale, were relatively minor when looking at all the circumstances. For example, the tax sale was not set aside because earlier notices did not mention the possibility of a sale when a later notice clearly did notify plaintiffs of the sale. 266 A.D.2d at 708. In this case a claimed deficiency was that notices of delinquency failed to identify any properties that could become subject to a tax sale. Another claimed deficiency in this case was that a two-year redemption period was cut down to two months in one instance and less than two years in all instances. These are not minor technicalities. Second, there was no question in *Greaney* that the municipality provided notice to the plaintiffs and actually postponed the sale at their request. *Id.* Here, however, one of the major complaints is lack of notice, in particular of the expiration of the redemption period, in any timely manner. Accordingly, *Greaney* is not controlling under the facts of this case.

Sherrill cites no other authority that would excuse its failure to provide due process. Sherrill does posit that even if due process was not provided, the only remedy available to the Nation is an additional time period within which to pay its delinquent taxes. *See McCann*, 71 N.Y.2d at 178, 524 N.Y.S.2d 398, 519 N.E.2d 309.

The Nation's remedy for the due process violations in the tax sales is to void the tax sales, declare the deeds a nullity, and provide it an opportunity to redeem the properties. *Id.* Opportunity to redeem the properties is not a viable remedy here, however, as it has been determined that Sherrill had invalidly assessed the taxes on sovereign land. Accordingly, the Nation's remedy should also include a declaration that the tax assessments, delinquencies, and sales are null and void.

**(3) *Counterclaims***

The Nation seeks summary judgment on Sherrill's counterclaims as well. The Nation contends that the counterclaims are barred by sovereign immunity. Sherrill argues that the Nation has not made the requisite showing that it is a federally recognized Indian tribe, and therefore this motion must be denied. However, the record is replete with evidence showing the Oneidas to be a federally recognized Indian tribe, protected by sovereign immunity. Case law also exists to that effect. *See, e.g., Oneida Indian Nation*, 434 F.Supp. at 538. Sherrill has admitted that it is a federally recognized Indian tribe. (Ans.¶ 5.) Sherrill cannot now contend that the Nation is not a federally recognized tribe possessing the protection of sovereign immunity.

Sherrill further argues that it would be fundamentally unfair to apply the doctrine of sovereign immunity where, as here, the sovereign brought claims against the party in federal court but claims immunity from the party's counterclaims. Sherrill argues that on this basis the Nation should be estopped from asserting sovereign immunity as a defense. However, Sherrill cites no law to support this argument. In fact, this is not the law. Rather, an Indian tribe is protected, by sovereign immunity, from compulsory counterclaims in a suit it has brought in federal court. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509-10, 111 S.Ct. at 909 (rejecting



the state's argument that by bringing the suit to enjoin the state from assessing its sales tax, the tribe waived its sovereign immunity). Thus, the Nation is not estopped from asserting sovereign immunity as an affirmative defense.

Accordingly, Sherrill's counterclaims are barred by the Nation's sovereign immunity. The Nation is entitled to summary judgment on its taxation and due process claims. It is further entitled to summary judgment dismissing the counterclaims brought against it.

**c. *Sherrill's Motion to Amend its Answer***

Sherrill seeks permission to amend its answer to assert the following affirmative defenses: laches, promissory and equitable estoppel, waiver, statute of limitations, ratification, and *in pari delicto*. The Nation contends that such amendment would be futile.

Leave to amend a complaint should be freely given. Fed.R.Civ.P. 15(a). Several factors may be considered when determining whether to permit an amendment. *Nerney v. Valente & Sons Repair Shop*, 66 F.3d 25, 28 (2d Cir.1995); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234, 235 (2d Cir.1995). Normally in the absence of " 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment' " leave to amend should be granted. *Rachman Bag Co.*, 46 F.3d at 234 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Undue delay or futility of amendment, inter alia, would be grounds upon the which the amendment should be denied. *Nerney*, 66 F.3d at 28.

The equitable doctrine of laches bars lawsuits brought after inordinate delay. *See Oneida II*, 470 U.S. at 244-45, 105 S.Ct. at 1256- 57; *Oneida Indian Nation*, 434 F.Supp. at 541-42. Laches, however, is not an available defense in actions brought by Indians, or by the United States on behalf of Indians, to protect their rights to their lands. *Oneida Indian Nation*, 434 F.Supp. at 541-42; *Seneca Nation of Indians v. State of New York*, No. 93-CV-688A, 1994 WL 688262, at *2 (W.D.N.Y. Oct.28, 1994); *see also Oneida II*, 470 U.S. at 244-45 & n. 16, 105 S.Ct. at 1256-57 & n. 16 (explaining that although the issue was not before the Court, it is doubtful that laches would bar such a suit). This is so due to the special trust relationship between the government and the Indians, and the federal statutory protection against the alienation of Indian land without congressional action. *Oneida Indian Nation*, 434 F.Supp. at 541-42; *see also Oneida II*, 470 U.S. at 244-45 & n. 16, 105 S.Ct. at 1256-57 & n. 16.

> And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This ... arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.

*Oneida Indian Nation*, 434 F.Supp. at 542 (quoting *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir.1956)) (internal citation omitted). Sherrill cites no contrary authority. Accordingly, it would be futile to permit Sherrill to amend its answer to add the affirmative defense of laches.

Sherrill argues that waiver and promissory and equitable estoppel are also viable defenses. Sherrill contends that the Nation's claim to the land "since time immemorial" is



inconsistent with open market purchases and therefore waiver and estoppel are valid defenses. However, the same federal policy of protecting the Indians and their rights to their land that precludes a defense of laches also precludes waiver and estoppel defenses. *See Seneca Nation of Indians*, 1994 WL 688262, at *2. Again, Sherrill cites no authority for its proposition that these defenses are available in a claim by Indians relating to their rights to their land free from taxation. Amending Sherrill's answer to add the defenses of waiver and estoppel would be futile.

The *in pari delicto* defense applies where there is mutual wrongdoing, giving rise to a supposition in favor of the defending party. *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1089-90 (2d Cir.1997). Here there is no asserted wrongdoing on the part of either party. Rather, it is simply a matter of whether the properties in question are taxable by Sherrill. As Sherrill states, the only question here is whether the properties are Indian Country. The *in pari delicto* defense is not applicable. Any amendment to add this defense would be futile.

No statute of limitations governs actions by Indians to enforce property rights. *Oneida II*, 470 U.S. at 240, 105 S.Ct. at 1254; *Seneca Nation of Indians*, 1994 WL 688262, at *1. Thus, there would be no statute of limitations bar to an action by the Nation to enforce the right to maintain its property free from taxation by Sherrill. Sherrill cites no contrary law. Any amendment to add a statute of limitations defense would be futile.

The final defense Sherrill wishes to assert is ratification. Sherrill argues that it need not specify, prior to discovery, which of the twenty five treaties executed between 1795 and 1846 between the Oneidas and New York State it believes will show that Congress ratified the 1805 and 1807 conveyances. Ordinarily amendment of pleadings to add

available affirmative defenses would be permissible without factual support. However, here there was a pending summary judgment motion. The Nation, in support of its motion for summary judgment, adduced factual support for a finding that the properties are in fact Indian Country. (*See* Thomas Decl.) The burden then became Sherrill's to adduce sufficient facts to the contrary. A ratification defense necessarily must be based upon a congressional act. *See Oneida II*, 470 U.S. at 246-48, 105 S.Ct. at 1257-58. Further discovery is unnecessary, as the treaties have been available. Sherrill failed to meet its burden of pointing out some express language indicating congressional intent to ratify the conveyances in issue and thus change the status of the Reservation. *See id.* Accordingly, permitting Sherrill to now assert a ratification defense would be antithetical to summary judgment motion practice.

**2. *Eviction Case***

The Nation also seeks summary judgment on the petition for eviction brought against it by Sherrill on the basis of sovereign immunity. As discussed above, the Nation is entitled to sovereign immunity from suit. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509-10, 111 S.Ct. at 909. Accordingly, the Nation is entitled to summary judgment dismissing the petition for eviction.

**3. *Member Case***

The Nation representatives move to stay this action pending resolution of the Lead Case; or in the alternative to dismiss the suit for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)*(6)*, and for failure to join an indispensable party pursuant to Fed.R.Civ.P. 19(b). Based upon the foregoing determination that the properties in question constitute Indian Country and are not taxable, the motion to stay is moot. Accordingly, the motion to dismiss will be addressed.



**a. *Failure to State a Claim***

The Nation representatives argue that they are entitled to the same sovereign immunity as the Nation enjoys, in their official capacities. The Nation representatives also argue that Sherrill's attempts to hold them individually liable for property tax payments and sales tax collection are contrary to New York State law. Accordingly, the Nation contends that Sherrill's complaint fails to state a claim.

Sherrill argues that it is not attempting to hold the Nation representatives personally liable for the actions of the Nation or for the payment or collection of taxes; rather, it is claiming that the Nation representatives have been unjustly enriched by the Nation's failure to pay property taxes and collect state sales taxes. Sherrill further argues that sovereign immunity does not apply to individual Nation members where, as here, their acts are ultra vires. Finally, Sherrill argues that the Nation, the State, and other Sherrill landowners are not indispensable parties.

A cause of action shall not be dismissed for failure to state a claim under Fed.R.Civ.P. 12(b)*(6)*, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In considering a motion brought pursuant to Fed.R.Civ.P. 12(b), the court must assume all of the allegations in the complaint are true. *Id.*

A review of the complaint makes clear the nature of Sherrill's action against the Nation representatives. Sherrill seeks a declaration that it can lawfully impose and collect property taxes from the Nation representatives and that they and the Nation are in violation of state law for failure to collect and remit state sales tax on sales made to non-Indians.

Sherrill further seeks eviction, damages for unjust enrichment based upon the receipt and use of municipal services, injunctive relief prohibiting the Nation from making additional purchases of property within Sherrill, and injunctive relief prohibiting the Nation from expanding current structures or constructing new buildings on the properties. These claims mirror almost to the letter the counterclaims in the Lead Case. As has already been determined, the Nation is entitled to sovereign immunity on those counterclaims. It therefore appears that Sherrill is making the very same claims, albeit cloaked in unjust enrichment language, against the Nation representatives in an effort to avoid the sovereign immunity bar.

Sherrill relies upon *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 514, 111 S.Ct. at 912, in support of its proposition that it can sue to enforce the state sales tax and it can sue the individual Nation representatives. In that case, the Supreme Court found that the state did have the authority to enforce its sales tax on sales made to non-Indians on the reservation. *Id.* at 512, 111 S.Ct. at 911. It did not hold that a local municipality can sue to enforce the collection of sales tax imposed by the state. *See id.* Sherrill argues it is not attempting to enforce state sales tax collection. Rather, it suggests it should be able to recoup damages for the unjust enrichment of the Nation representatives obtained from their failure to collect state sales tax. Again, Sherrill attempts to avoid the bar of sovereign immunity by framing the claim as one for unjust enrichment when in fact it is clearly for the collection of state sales tax.

In *Citizen Band Potawatomi Indian Tribe*, the Supreme Court, in response to the state's argument that although it had a right to collect sales tax it had no remedy, discussed the alternatives a state might have to enforce its right to collect sales tax. *Id.* at 514, 111 S.Ct. at 912. The Court stated: "We have never held that individual agents or officers of a tribe



are not liable for damages in actions brought by the State." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *see also Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 72, 114 S.Ct. 2028, 2035, 129 L.Ed.2d 52 (1994) (restating alternative remedies as set forth in *Citizen Band Potawatomi Indian Tribe*). As can be seen, the Court did not hold, as Sherrill suggests, that whenever a claim against a tribe is barred by sovereign immunity individual tribe members may be sued. Rather, the Court was suggesting that where a tribal official acts outside the law, the official may not be protected by sovereign immunity. *See Ex parte Young*, 209 U.S. at 167, 28 S.Ct. at 457; *see also Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2d Cir.2000) (explaining that a complaint seeking to impose liability on an individual tribal member must allege that the act was beyond the authority the tribe could lawfully bestow); *Yakama Indian Nation v. Washington Dep't of Revenue*, 176 F.3d 1241, 1246 (9th Cir.1999) (discussing immunity not available only when state officer acts without any authority).

Sherrill's argument rests upon the Nation's refusal to pay property taxes and to collect state sales tax as being unlawful. However, the conclusion was previously reached that the property at issue is Indian Country, and therefore the refusal to pay property taxes was in conformity with the law. As was previously noted, Sherrill has not shown any authority upon which to base its claim regarding collection of state sales tax. Thus, it cannot argue that the acts of the Nation or Nation representatives were contrary to law. Accordingly, the Nation representatives enjoy the benefit of the Nation's tribal sovereign immunity. *See Bassett*, 204 F.3d at 358.

The Nation representatives' second argument also has merit. New York State law and the Sherrill Charter set forth specific procedures for collection of property taxes. The Sherrill Charter provides only for foreclosure and sale for tax

delinquency, but not for personal liability of landowners. (First Carmen Aff. Ex. 19.) Sherrill's authority is limited by its Charter. *See Rose v. Eichhorst*, 42 N.Y.2d 92, 94, 396 N.Y.S.2d 837, 365 N.E.2d 868 (N.Y.1977). Moreover, even if the Sherrill Charter permitted landowner liability, as permitted by New York law, the Amended Complaint would not state a claim against the Nation representatives. New York law (which has not been incorporated into the Sherrill Charter) permits personal liability against an owner of property who is a resident of the city or town in which the property is assessed, if the landowner's name is correctly entered on the roll. N.Y. Real Prop. Tax L. § 926 (McKinney 2000). Sherrill's Amended Complaint does not allege that the Nation representatives are owners of the properties, reside in Sherrill, or have their names on the tax roll. Additionally, it is undisputed that the Nation, not the Nation representatives, is the owner of the property; the Nation representatives reside in Vernon, not Sherrill; and the Nation representatives' names are not on the tax roll for these properties. It is therefore clear that the Nation representatives cannot be held personally liable for the unpaid property taxes.

**b.** ***Failure to Join an Indispensable Party***

The Nation representatives finally contend that the Nation, New York State, and other Sherrill landowners are indispensible parties and therefore the action should be dismissed pursuant to Fed.R.Civ.P. 19(b). Sherrill argues that none are necessary nor indispensable.

A person is necessary and shall be joined as a party if

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of



> the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a). Rule 19 further provides that in the absence of a necessary party the court must determine "whether in equity and good conscience the action should proceed among the parties before it." Fed.R.Civ.P. 19(b). The court should consider "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provision in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed" under this rule. *Id.*

A review of Sherrill's claims and sought after relief makes clear that the Nation is an indispensable party. Sherrill seeks a declaration that the Nation representatives and the Nation are in violation of state law for failure to collect and remit state sales tax. Sherrill further seeks eviction, damages for unjust enrichment based upon the receipt and use of municipal services, injunctive relief prohibiting the Nation from making additional purchases of property within Sherrill, and injunctive relief prohibiting the Nation from expanding or constructing new buildings on the properties. The Nation is the owner of the properties at issue, thus claims a significant interest in the outcome of the action. It is also questionable to what extent relief in the Nation's absence would be adequate, since it is the Nation and not each individual Nation representative that would be directed, for

example, to refrain from further purchases. The Nation is an indispensable party under Rule 19(a). *See Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir.1991).

Sherrill contends that reliance on *Fluent* is misplaced and suggests instead reliance on *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir.2000). In *Bassett*, the Second Circuit reversed the district court's finding that the tribe was an indispensable party. 204 F.3d at 358. The plaintiff had sued a tribe and museum, among other defendants, for copyright infringment. *Id.* Dismissal of the tribe was required because the tribe was immune from suit. *Id.* In finding that the tribe was not an indispensable party, the *Bassett* Court reasoned that in copyright infringement actions joint tortfeasors are jointly and severally liable, and the victim need not sue each and every joint tortfeasor but may pick and choose which to sue. *Id.* Thus, a joint tortfeasor in a copyright infringement action is not an indispensable party. *Id.* In those circumstances, therefore, the important factors in the 19(b) analysis were potential prejudice in the absence of the tribe and whether an adequate remedy existed if the action were dismissed. *Id.* Because dismissal would completely deprive the plaintiff of a remedy, and since the tribe as a joint tortfeasor could not be considered indispensable, it was not within the district court's discretion to dismiss the claim. *Id.*

Here, however, the important factors are the prejudice to the Nation, which would be substantial since it is the owner of the properties at issue, and for the same reason the absence of the ability to shape the relief to lessen the prejudice to the Nation. To a lesser extent the adequacy of relief is significant. Moreover, Sherrill does not argue that deprivation of a remedy should be determinative here.



Joinder of the Nation is therefore desirable. However, the Nation enjoys the protection of sovereign immunity against such joinder. *See Fluent*, 928 F.2d at 547.

A balancing of the Rule 19(b) factors is therefore necessary. All of the relief sought would impair and impede the Nation's ability to protect its interests in the properties. Any judgment rendered in its absence would necessarily prejudice the Nation. Relief cannot be shaped in a manner to prevent or lessen that prejudice. While should the action be dismissed pursuant to Rule 19, Sherrill may be deprived of a remedy for the wrongs it alleges, "lack of a forum does not automatically prevent dismissal of the claims asserted," *Id.* Moreover, to permit the suit to continue absent the Nation would undermine federal congressional policy and contravene "the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Id.* at 548. It is again notable that it is for Congress alone to clearly and unequivocally change the federal policy of affording protection to the Indians and their lands. *See id.* at 547.

In equity and good conscience the action should not be permitted to proceed without the Nation as a party. Rather, the action must be dismissed. *See* Fed.R.Civ.P. 19(b); *Fluent*, 928 F.2d at 548. Given this conclusion, it is unnecessary to determine whether the State and Sherrill landowners would be indispensable parties without which the action should be dismissed.

**4. *Related Case***

This action, as noted above, was brought by the Nation to prevent Madison County from pursuing an in rem foreclosure proceeding brought against the county properties for tax delinquencies. All the facts in the Lead Case likewise apply in this case. Moreover, as Madison County appeared as

amicus curiae in the Lead Case, it had a full opportunity to be heard on the taxation issue. Accordingly, based upon the foregoing determination that the properties at issue are Indian Country and therefore not taxable, the Nation is entitled to judgment on the pleadings. A pending motion by Madison County to dismiss the action for failure to join indispensable parties, pursuant to Fed.R.Civ.P. 19, is resolved by separate Memorandum-Decision and Order filed this day.

**E. *Attorneys Fees***

A district court is authorized to award attorneys fees to a prevailing party in proceedings to vindicate civil rights. 42 U.S.C. § 1988(b); *Raishevich v. Foster*, 247 F.3d 337, 344 (2d Cir.2001). The first step in determining eligibility for such an award is whether the party seeking attorneys fees is a prevailing party. *Raishevich*, 247 F.3d at 345. Even if prevailing party status is established, however, the party is not always entitled to attorneys fees. *Id.*

Where special circumstances are present, it may be appropriate to deny attorneys fees. *Id.* at 344. Initially it must be determined "whether 'the plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily retained.' " *Id.* (quoting *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir.1982)). The apparent quality of the case at the time counsel is sought must be considered as an indication of the likelihood that counsel could be retained without the promise of a statutory award of fees. See *id.* Only if this first requirement is met will the final analysis of circumstances be undertaken in order to deny fees. *Id.* at 344-45. Where all of the circumstances, including "the award of punitive damages, the amount of the compensatory award, the degree and measurability of the harm to the plaintiff, and the public interest in the particular claim," indicate that an award of fees



" 'might work an injustice,' " such an award may be denied. *Id.* (quoting *Kerr*, 692 F.2d at 878).

Here the Nation sought only declaratory and injunctive relief. It did not seek compensatory or punitive damages. The foregoing analysis establishes that the Nation is entitled to the declaratory and injunctive relief sought. Accordingly, the Nation is a prevailing party.

Consideration of the merits of the Nation's claim at the time counsel was sought reveals that the claim was very strong on the merits and was likely to result in a judgment awarding all the relief sought. At that time there was no question that the properties were a part of the original Reservation. There was also no serious question that if the reservation status of the lands had not been changed by Congress, then the local municipalities lacked authority to tax the properties. Moreover, a search of public records, without the need for discovery, would have led to substantial confidence that no congressional changes in the status of the land had occurred. Additionally, the Nation's due process claim had clear merit in that the process Sherrill followed did not even meet the City Charter requirements. This failure to meet the City Charter requirements would have been clear at the time the Nation attempted to retain counsel.

An initial determination that unique, special circumstances make it appropriate to deny attorneys fees is warranted, although the Nation did not seek compensatory damages. The probability of a significant compensatory award is considered because it does not contravene the purpose of the fee- shifting statute. *Id.* at 344. Rather, the prospect of such an award, in a case with strong merits, makes retention of counsel easier for the civil rights plaintiff, so that an award of attorneys fees does not further the purpose of the fee-shifting statute. See *id.* The purpose of an attorneys fee award is to " 'encourage the bringing of meritorious civil rights claims

which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.' " *Id.* (quoting *Kerr*, 692 F.2d at 877). Here, counsel had been obtained for the land claim litigation and this follow- on tax claim litigation. Further, the Nation has significant financial resources. It can be confidently stated that this meritorious civil rights claim would not have "otherwise been abandoned" had there not been the prospect of recovery of a statutory attorneys fee award. *See id.* The strength of the merits of the claims and the significance of the status of the properties at issue, coupled with the known financial resources of the Nation, make an appropriate case for a finding of special circumstances.

Having determined that the first requirement for denial of fees is met, it must be determined whether an award of fees might work an injustice. Although there is no award of compensatory or punitive damages, the declaratory and injunctive relief obtained works a financial detriment on Sherrill and Madison County. Sherrill and Madison County have lost the property tax revenue from the properties from the time of the reacquisition, for as long as the Nation retains them. The harm to the Nation, given the relief obtained herein, is nonexistent, or at best, relatively little in degree and difficult to measure. The general public does, of course, have an interest in these claims. However, these are not the type of civil rights claims which the law was designed to encourage. Rather, these claims are more in the nature of disputes between sovereign parties.

Special circumstances make this an appropriate case to deny attorneys fees. *See id.* at 344. In light of all of the circumstances of the case such an award is not warranted and would work an injustice. Accordingly, an award of attorneys fees must be denied. *See id.* at 345.



## V. *CONCLUSION*

The Sherrill and Madison County properties that are the subject of the instant lawsuits are Oneida Reservation lands and therefore are Indian Country pursuant to 25 U.S.C. § 1151. The 1838 Treaty of Buffalo Creek did not disestablish or diminish the Oneida Reservation. As Indian Country, the properties are not subject to taxation by Sherrill or the Counties. Moreover, Sherrill did not provide the Nation the process it was due in foreclosing on the properties. Sherrill's motion for summary judgment in the Lead Case must therefore be denied. Sherrill's motion to amend its answer must also be denied, as amendment to add the asserted affirmative defenses would be futile. The Nation's cross motion for summary judgment in the Lead Case on its taxation and its due process claims must be granted. Sherrill's counterclaims against the Nation in the Lead Case are barred by sovereign immunity. The Nation is entitled to judgment in its favor on the counterclaims.

The Nation is also protected by sovereign immunity from suit for eviction by Sherrill and therefore is entitled to judgment in its favor in the Eviction Case.

The motion to stay in the Member Case is moot. The actions of any individual Nation representatives in directing the Nation not to pay property taxes was not *ultra vires*, as the properties are Indian Country and not taxable. The lawsuit against the Nation representatives for collection of property taxes is contrary to the Sherrill Charter and New York State law. Moreover, the Nation would be an indispensable party and any such suit must be dismissed in its absence. The motion to dismiss brought by the Nation representatives in the Member Case must be granted.

The properties in question being Indian Country, the Nation is entitled to judgment on the pleadings in the Related Case against Madison County.

The Nation is not entitled to an award of attorneys fees.

Accordingly, it is

ORDERED that

1. The City of Sherrill's motion for summary judgment or in the alternative for a preliminary injunction in the Lead Case 00-CV-223 is DENIED;

2. The Oneida Indian Nation of New York's cross motion for summary judgment in the Lead Case 00-CV-223, on all claims and counterclaims, is GRANTED;

3. The counterclaims against the Oneida Indian Nation of New York brought by the City of Sherrill in the Lead Case 00-CV-223 are DISMISSED;

4. The City of Sherrill's motion to amend its answer to add affirmative defenses in the Lead Case 00-CV-223 is DENIED;

5. The Oneida Indian Nation of New York's motion for summary judgment in the Eviction Case 00-CV-327 is GRANTED, and the petition for eviction is DISMISSED;

6. Ray Halbritter, Keller George, Chuck Fougnier, Brian Patterson, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Iva Rodgers, Beulah Green, and Ruth Burr's motion to dismiss in the Member Case 00-CV-1106 is GRANTED, and the complaint is DISMISSED;



7. Judgment on the pleadings in favor of the Oneida Indian Nation of New York and against Madison County is GRANTED in the Related Case 00-CV-506;

8. The properties at issue, known by tax identification as City of Sherrill parcels 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26, 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015-2-40.3, 322.015-2-45.1, 322.015-2-47 and Madison County parcels 28.-2-13.11, 28.-2-13.2, 36.5-1-20, 36.38-1-34, 36.6-1- 4, 36.38-1-33, 36.38-1-32, 36.62-2-21, 91.-1-51, 36.6-1-1, 36.6-1-3, 36.-1-2, and 28.-2-13.12 are Indian reservation land immune from state and local property taxation while in the possession of the Oneida Indian Nation of New York; the Oneida Indian Nation of New York is immune from property taxation with respect to these properties, attempts by the City of Sherrill and Madison County to tax or foreclose on these properties while they are in the possession of the Oneida Indian Nation of New York are null and void; tax sales with respect to these properties are null and void; attempts by the City of Sherrill to foreclose and to convey them violated 42 U.S.C. § 1983 because of constitutionally-deficient notice; attempts by the City of Sherrill and Madison County to interfere with the ownership, possession, and occupancy of the Oneida Indian Nation of New York with respect to these properties or to evict the Oneida Indian Nation of New York from said properties are null and void;

9. The City of Sherrill and its officers, agents, servants, and employees and all persons and entities in active concert or participation with them are hereby ENJOINED and RESTRAINED from taking any act to impose property taxes upon, or to collect property taxes with respect to the properties known by tax identification numbers 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26, 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015-2-40.3, 322.015-2-45.1, 322.015-2-47 while they are in the possession of the

Oneida Indian Nation of New York; from interfering with the Oneida Indian Nation of New York's ownership, possession, or occupancy of these properties; and from taking any act to evict the Oneida Indian Nation of New York or its officers, agents, servants, employees, members, guests, customers or invitees from these properties; and are further ENJOINED to rescind and reverse all property transfers with respect to foreclosure or conveyance regarding these properties and to record these properties as owned by the Oneida Indian Nation of New York until such time as a conveyance of them is approved pursuant to 25 U.S.C. § 177; and

10. Madison County and its officers, agents, servants, and employees and all persons and entities in active concert or participation with them are hereby ENJOINED and RESTRAINED from taking any act to impose property taxes upon, or to collect property taxes with respect to the properties known by tax identification numbers 28.-2-13.11, 28.-2-13.2, 36.5-1-20, 36.38-1-34, 36.6-1- 4, 36.38-1-33, 36.38-1-32, 36.62-2-21, 91.-1-51, 36.6-1-1, 36.6-1-3, 36.-1-2, and 28.-2-13.12 while they are in the possession of the Oneida Indian Nation of New York; from interfering with the Oneida Indian Nation of New York's ownership, possession, or occupancy of these properties; and from taking any act to evict the Oneida Indian Nation of New York or its officers, agents, servants, employees, members, guests, customers or invitees from these properties; and are further ENJOINED to rescind and reverse all property transfers with respect to foreclosure or conveyance regarding these properties and to record these properties as owned by the Oneida Indian Nation of New York until such time as a conveyance of them is approved pursuant to 25 U.S.C. § 177.

11. Attorneys fees pursuant to 42 U.S.C. § 1988 are DENIED.



The Clerk of the Court is directed to enter separate judgments in each case in accordance with this Memorandum-Decision and Order.

IT IS SO ORDERED.

**ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING OR REHEARING *EN BANC***
**FILED SEPTEMBER 15, 2003**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th Day of September, two thousand three.

Docket No. 01-7795

ONEIDA INDIAN NATION OF NEW YORK,
Plaintiff-Counter-Defendant-Appellee,

RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, RUTH BURR, BRIAN PATTERSON, IVA RODGERS,
Consolidated Defendants-Appellees,

v.

CITY OF SHERRILL, NEW YORK,
Defendant-Counter-Claimant-Appellant,

MADISON COUNTY,
Amicus Curiae-Appellant,



ONEIDA LTD., STATE OF NEW YORK,
Amicus Curiae-Amicus

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by Defendant-Counter-Claimant-Apellant, City of Sherrill, New York

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: s/_____
Arthur Heller,
Motions Staff Attorney

**1788 TREATY OF FORT SCHUYLER, SEPTEMBER 22, 1788**

STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indiana called the Oneidas - it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly, Of the paid ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the Said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly pounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner 6 ' of last mentioned tract; thence due south until it intersects a due west line from the bead of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek' to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved



lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and' cultivation, but not to be. sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be. made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lauds along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each aide of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lauds to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indiana (now settled at Brothertown under

the pastoral care of the Rev. Samson Occom and their posterity forever, and the Stockbridge Indians and their posterity forever are to enjoy their settlements on the lands heretofore given to. them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indiana, and a tract of six miles square for the Stockbridge Indiana.

Thirdly, In consideration of the Raid Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist milt and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but it the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollar's shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid and as a further consideration to the Oneidas the people Of the State of New York shall grant to the Raid John Francis Perache a tract of land, Beginning in the line of property at it certain cedar tree near the road leading to Oneida and runs from the Raid cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache bath consented to accept from the Oneidas in satisfaction for an



injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George IV. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to tile said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from tile Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the Raid ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, front residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation. and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said state, for the time being And further, the Oneidas and their posterity forever shall at the request of the Governor of the Raid State be aiding to the people of the State of New York in removing all such intruders and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end I hat such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation its the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE
KANAGHGWEYA



## 1794 TREATY OF CANANDAIGUA, NOVEMBER 11, 1794

Preamble of the Canandaigua Treaty

A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations:

The President of the United States having determined to hold a conference with the Six Nations of Indians for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the sachems and warriors of the Six Nations in general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations....

ARTICLE 1. Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE 2. The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 3. The land of the Seneca Nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps; the line runs westerly along the lake, as far as Oyongwongyeh Creek, at Johnson's Landing Place, about four miles eastward, from the fort of Niagara; then southerly, up that creek to its main fork, continuing the same straight course, to that river; (this line, from the mouth of Oyongwongyeh Creek, to the river Niagara, above Fort Schlosser, being the eastern boundry of a strip of land, extending from the same line to Niagara River, which the Seneca Nation ceded to the King of Great Britain, at the treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the Niagara River to Lake Erie, to the northwest corner of a triangular piece of land, which the United States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning, on the Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the right to purchase.

ARTICLE 4. The United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and engaged never to claim the same, not disturb them, or any of the Six Nations, or their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; now, the Six Nations, and each of them, hereby engage that they will never claim any other



lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE 5. The Seneca Nation, all others of the Six Nations concurring cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road for the purposes of traveling and transportation. And the Six Nations and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes, where necessary, for their safety.

ARTICLE 6. In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among them, a quantity of goods, of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed to them by an article ratified by the President, on the twenty-third day of April, 1792, making in the whole four thousand five hundred dollars; which shall be expended yearly, forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils, suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their

benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent, appointed by the President, for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve or peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for that purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity, stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes or families of Indians, elsewhere resident.

IN WITNESS WHEREOF, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereunto set their hands and seals.

Done at Canandaigua, in the State of New York, in the eleventh day of November, in the year one thousand seven hundred and ninety-four.



TIMOTHY PICKERING

Witnesses
Interpreters
Israel Chapin Horatio Jones
Wm. Shepard Jun'r Joseph Smith
James Smedley Jasper Parrish
John Wickham Henry Abeele
Augustus Porter
James H. Garnsey
Wm. Ewing
Israel Chapin, Jun'r

(Signed by fifty-nine Sachems and War Chiefs of the Six Nations.)

CANANDAIGUA, NEW YORK - NOVEMBER 11, 1797

Native American Name English Translation
O-NO-YE-AH-NEE O-NA-AH-HAH TUG-GEH-SHOT-TA KON-NE-AT-OR-TEE-OOH HOT-OSH-A-HENH TEH-ONG-YOO-WUSH Handsome Lake
KAU-KON-DA-NAI-YA TEH-ONG-YA-GAU-NA TO-KENH-YOU-HAU Capt. Key
NON-DI-YAU-KA KON-NE-YOO-WE-SOT O-NES-HAU-EE KOS-SISH-TO-WAU TI-OOH-QUOT-TA-KAU-NA Woods On Fire
HENDRICK AUPAUMUT TO-HE-ONG-GO TA-OUN-DAU-DEESH DAVID NEESOONHUK OO-JAU-GEHT-A Fish Carrier
HO-NA-YA-WUS KANATSOYH Farmer's Brother or Nicholas Kusick
OOT-A-GUAS-SO SOG-GOO-YA-WAUT-HAU SOH-HON-TE-O-QUENT JOO-NON-DAU-WA-ONCH Red Jacket

OO-DUHT-SA-IT KAU-NEH-SHONG-GOO KON-YOO-TAI-YOO KO-NOOH-QUNG KI-YAU-HA-ONH SAUH-TA-KA-ONG-YEES Two Skies Of A Length
TOS-SONG-GAU-LO-LUSS OO-TAU-JE-AU-GENH Broken Axe
OUN-NA-SHATTA-KAU JOHN SHEN-EN-DO-A TAU-HO-ON-DOS KA-UNG-YA-NEH-QUEE O-NE-AT-OR-LEE-OOH Open The Way or Handsome Lake
SOO-A-YOO-WAU TWAU-KE-WASH-A KUS-SAU-WA-TAU KAU-JE-A-GA-ONH SE-QUID-ONG-QUEE Heap Of Dogs
E-YOO-TEN-YOO-TAU-OOK KO-DJEOTE SOO-NOOH-SHOO-WAU KOHN-YE-AU-GONG Half Town or Jake Stroud
THA-OG-WAU-NI-AS KEN-JAU-AU-GUS SHA-QUI-EA-SA Stinking Fish
SOO-NONG-JOO-WAU TEER-OOS SOO-NOH-QUA-KAU KI-ANT-WHAU-KA Capt. Prantup or Cornplanter
TWEN-NI-YA-NA HENRY YOUNG BRANT JISH-KAA-GA SOOS-YOO-WAU-NA Green Grasshopper or Big Sky or Little Billy



## 1838 TREATY OF BUFFALO CREEK, JANUARY 15, 1838

Articles of a treaty made and concluded at Buffalo Creek in the State of New York, the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, head men and warriors of the several tribes of New York Indians assembled in council witnesseth:

WHEREAS, the six nations of New York Indians not long after the close of the war of the Revolution, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead them to seek a new home among their red brethren in the West: And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift or purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force, and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States, purchases were made by the New York Indians from the Menomonie and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonie Indians, concluded in February, 1831, to which the New York Indians gave their assent on the seventeenth day of

October 1832: And whereas, by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years, or such reasonable time as the President should prescribe: And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favour of emigration, preferred to remove at once to the Indian territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian territory. And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint.

GENERAL PROVISIONS.

ARTICLE 1.

The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and



the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside: beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line, northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

ARTICLE 2.

In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands to the place of beginning to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes

or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York, and the same is to be divided equally among them, according to their respective numbers, as mentioned in a schedule hereunto annexed.

ARTICLE 3.

It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

ARTICLE 4.

Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their



own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

ARTICLE 5.

The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

ARTICLE 6.

It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

ARTICLE 7.

It is expressly understood and agreed, that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe, or distinct branch of a tribe, shall not be construed to invalidate as to others, but

as to them it shall be binding, and remain in full force and effect.

ARTICLE 8.

It is stipulated and agreed that the accounts of the Commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

SPECIAL PROVISIONS FOR THE ST. REGIS.

ARTICLE 9.

It is agreed with the American party of the St. Regis Indians, that the United States will pay to the said tribe, on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars, as a remuneration for monies laid out by the said tribe, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and in removal to the same, the same to be aportioned out to the several claimants by the chiefs of the said party and a United States' Commissioner, as may be deemed by them equitable and just. It is further agreed, that the following reservation of land shall be made to the Rev. Eleazor Williams, of said tribe, which he claims in his own right, and in that of his wife, which he is to hold in fee simple, by patent from the President, with full power and authority to sell and dispose of the same, to wit: beginning at a point in the west bank of Fox River thirteen chains above the old milldam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west, two hundred and forty chains; thence north thirty-seven degrees and thirty



minutes east, two hundred chains, thence south fifty-two degrees and thirty minutes east, two hundred and forty chains to the bank of Fox river; thence up along the bank of Fox river to the place of beginning.

SPECIAL PROVISIONS FOR THE SENECAS.

ARTICLE 10.

It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians, and to extend so far west, as to include one half-section (three hundred and twenty acres) of land for each soul of the Senecas, Cayugas and Onandagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same, to be disposed of as follows: the sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which is to be paid to them at their new homes, annually, and

the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said apprisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

ARTICLE 11.

The United States will set apart for the Cayugas, on their removing to their new homes at the west, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

ARTICLE 12.

The United States agree to set apart for the Onondagas, residing on the Seneca reservations, two thousand five hundred dollars, on their removing west, and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes. And the United States further agree to pay to the said Onondagas, on their removal



to their new homes in the west, two thousand dollars, to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

ARTICLE 13.

The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

SPECIAL PROVISIONS FOR THE TUSCARORAS.

ARTICLE 14.

The Tuscarora nation agree to accept the country set apart for them in the Indian territory, and to remove there within five years, and continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country, at the forks of the Neasha river, which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location, they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation, on their settling at the West, three thousand dollars, to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns, in fee simple, five thousand acres of land, lying in

Niagara county, in the State of New York which was conveyed to the said nation by Henry Dearborn and they wish to sell and convey the same before they remove West: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the President to sell and convey the same, and the money which shall be received for the said lands, exclusive of the improvements, the President shall invest in safe stocks for their benefit, the income from which shall be paid to the nation, at their new homes, annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed, and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised, and shall not be sold at a less price than the appraisal, without the consent of James Cusick, William Mountpleasant and William Chew, or the survivor, or survivor of them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before investment.

And whereas, at the making of this treaty, Thomas L. Ogden and Joseph Fellows, the assignees of the State of Massachusetts, have purchased of the Tuscarora nation of Indians, in the presence and with the approbation of the commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest, and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas, the consideration money for said lands has been secured to the said nation to their satisfaction, by Thomas L. Ogden and Joseph Fellows; therefore the United States hereby assent to the said sale and conveyance and sanction the same.

ARTICLE 15.



The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions, as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals, and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof, the commissioner and the chiefs, head men, and people, whose names are hereto annexed, being duly authorized, have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

R. H. Gillet, Commissioner.

Senecas:
Dao-nepho-gah, or Little Johnson,
Da-ga-o-geas, or Daniel Twoguns,
Gee-odow-neh, or Captain Pollard,
Joh-nes-ha-dih, or James Stevenson,
Hure-hau-stock, or Captain Strong,
So-ne-a-ge, or Captain Snow,
Hau-neh-hoy's-oh, or Blue Eyes,
Haw-naw-wah-es, or Levi Halftown,
Goat-hau-oh, or Billy Shanks,
Hau-sa-nea-nes, or White Seneca,
Howah-do-goh-deh, or George Bennet,
Hays-tah-jih, or Job Pierce,
Sho-nan-do-wah, or John Gordon,
Noh-sok-dah, or Jim Jonas,
Shaw-neh-dik, or William Johnson,

Gaw-neh-do-au-ok, or Reuben Pierce,
Shaw-go-nes-goh-sha-oh, or Morris Halftown,
Shaw-go-za-sot-hoh, or Jacob Jameson,
Gua-wa-no-oh, or George Big Deer,
Joh-que-ya-suse, or Samuel Gordon,
Gua-ne-oh-doh, or Thompson S. Harris,
Gau-geh-queh-doh, or George Jimeson,
Hon-non-de-uh, or Nathaniel T. Strong,
Nuh-joh-gau-eh, or Tall Peter,
Sho-nauk-ga-nes, or Tommy Jimmy,
So-joh-gwa-us, or John Tall Chief,
Shau-gau-nes-es-tip, or George Fox,
Go-na-daw-goyh, or Jabez Stevenson,
Tit-ho-yuh, or William Jones,
Juneah-dah-glence, or George White, by his agent White Seneca,
Gau-nu-su-goh, or Walter Thompson, by his agent Daniel Twoguns,
Dau-ga-se, or Long John,
Gua-sa-we-dah, or John Bark,
Gau-ni-dough, or George Lindsay,
Ho-ma-ga-was, or Jacob Bennet,
On-di-heh-oh, or John Bennet,
Nis-ha-nea-nent, or Seneca White,
Ha-dya-no-doh, or Maris Pierce,
Yoh-dih-doh, or David White,
James Shongo,
Ka-non-da-gyh, or William Cass,
Ni-ge-jos-a, or Samuel Wilson,
Jo-on-da-goh, or John Seneca.
Tuscaroras:
Ka-nat-soyh, or Nicholas Cusick,
Sacharissa, or William Chew,
Kaw-we-ah-ka, or William Mt. Pleasant,
Kaw-re-a-rock-ka, or John Fox,
Gee-me, or James Cusick,
Ju-hu-ru-at-kak, or John Patterson,



O-tah-guaw-naw-wa, or Samuel Jacobs,
Ka-noh-sa-ta, or James Anthony,
Gou-ro-quan, or Peter Elm,
Tu-nak-she-a-han, or Daniel Peter.
Oneidas residing in the State of New-York, for themselves and their parties:
Baptiste Powlis,
Jonathan Jordan.
Oneidas at Green Bay:
John Anthony,
Honjoit Smith,
Henry Jordan,
Thomas King.
St. Regis:
Eleazer Williams, chief and agent.
Oneidas residing on the Seneca Reservation:
Hon-no-ne-ga-doh, or Silversmith, (For himself and in behalf of his nation.)
Hoge-wayhtah, or William Jacket,
Sah-hu-gae-ne, or Button George.
Principal Onondaga Warriors, in behalf of themselves and the Onondaga Warriors:
Ka-noh-qua-sa, or William John,
Dah-gu-o-a-dah, or Noah Silversmith.
Cayugas:
Skok-no-eh, or King William,
Geh-da-or-loh, or James Young,
Gay-on-wek, or Jack Wheelbarrow,
D'yo-ya-tek, or Joseph Isaac, For themselves and in behalf of the nation.
Principal Cayuga Warriors, in behalf of themselves and the Cayuga Warriors:
Hah-oh-u, or John Crow,
Ho-na-e-geh-dah, or Snow Darkness,
Gone-ah-ga-u-do, or Jacob G. Seneca,
Di-i-en-use, or Ghastly Darkness,
Hon-ho-gah-dyok, or Thomas Crow,

Wau-wah-wa-na-onk, or Peter Wilson,
So-en-dagh, or Jonathan White,
Sago-gan-e-on-gwus, or Harvey Rowe,
To-ga-ne-ah-doh, or David Crow,
Soh-win-dah-neh, or George Wheeler,
Do-goh-no-do-nis, or Simon Isaac,
He-dai-ses, or Joseph Peter,
Sa-go-di-get-ka, or Jacob Jackson.

Witnesses:
James Stryker, Sub-agent, Six Nations, New York Indians.
Nathaniel T. Strong, United States' Interpreter, New York agency.
H. B. Potter.
Orlando Allen.
H. P. Wilcox.
Charles H. Allen.
Horatio Jones.
Spencer H. Cone.
W. W. Jones.
J. F. Schermerhorn.
Josiah Trowbridge.
(To the Indian names are subjoined a mark and seal.)

SCHEDULE A.
CENSUS OF THE NEW YORK INDIANS AS TAKEN IN 1837.
Number residing on the Seneca reservations.

Senecas 2,309
Onondagas 194
Cayugas 130
2,633
Onondagas, at Onondaga 300
Tuscaroras 273
St. Regis, in New York 350



Oneidas, at Green Bay 600
Oneidas, in New York 620
Stockbridges 217
Munsees 132
Brothertowns 360

The above was made before the execution of the treaty.
R. H. Gillet, Commissioner.

SCHEDULE B.

The following is the disposition agreed to be made of the sum of three thousand dollars provided in this treaty for the Tuscaroras, by the chiefs, and assented to by the commissioner, and is to form a part of the treaty:
To Jonathan Printess, ninety-three dollars.
To William Chew, one hundred and fifteen dollars.
To John Patterson, forty-six dollars.
To William Mountpleasant, one hundred and seventy-one dollars.
To James Cusick, one hundred and twenty-five dollars.
To David Peter, fifty dollars.
The rest and residue thereof is to be paid to the nation.

The above was agreed to before the execution of the treaty.
R. H. Gillet, Commissioner.

SCHEDULE C.

Schedule applicable to the Onondagas and Cayugas residing on the Seneca reservations. It is agreed that the following disposition shall be made of the amount set apart to be divided by the chiefs of those nations, in the preceding parts of this treaty, any thing therein to the contrary notwithstanding.

To William King, one thousand five hundred dollars.
Joseph Isaacs, seven hundred dollars.
Jack Wheelbarrow, three hundred dollars.
Silversmith, one thousand dollars.
William Jacket, five hundred dollars.
Buton George, five hundred dollars.

The above was agreed to before the treaty was finally executed.
R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under the authority of the United States of America, at Buffalo Creek in the county of Erie, and State of New York, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and representing and acting for the said nation, on the one part, and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva, in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said Indians in and to the lands within the State of New York remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said chiefs and head men, on behalf of the Seneca nation did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Seneca nation of, in and to the several tracts, pieces, or parcels of land mentioned, and described in the instrument of writing next hereinafter set forth, and at the price or sum therein specified, as the consideration, or purchase money for such



sale and release; which instrument being read and explained to the said parties and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and acting for and on behalf of the said Seneca nation, of the first part, and Thomas Ludlow Ogden, of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said chiefs and head men of the Seneca nation of Indians, in consideration of the sum of two hundred and two thousand dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that certain tract, or parcel of land situate, lying and being in the county of Erie and State of New York commonly called and known by the name of Buffalo Creek reservation, containing, by estimation forty-nine thousand nine hundred and twenty acres be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the counties of Erie, Chatauque, and Cattaraugus in said State commonly called and known by the name of Cattaraugus reservation, containing by estimation twenty-one thousand six hundred and eighty acres, be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the said county of Cattaraugus, in said State, commonly called and known by the name of the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres, be the contents more or less. And also, all that certain other tract or parcel of land, situate, lying and

being partly in said county of Erie and partly in the county of Genesee, in said State, commonly called and known by the name of the Tonawando reservation, and containing by estimation twelve thousand, eight hundred acres, be the same more or less; as the said several tracts of land have been heretofore reserved and are held and occupied by the said Seneca nation of Indians, or by individuals thereof, together with all and singular the rights, privileges, hereditaments and appurtenances to each and every of the said tracts or parcels of land belonging or appertaining; and all the estate, right, title, interest, claim, and demand of the said party of the first part, and of the said Seneca nation of Indians, of, in, and to the same, and to each and every part and parcel thereof: to have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, their heirs and assigns, to their proper use and behoof for ever, as joint tenants, and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written.

Little Johnson,
Daniel Two Guns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,



John Pierce,
John Gordon,
Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jimeson,
Samuel Gordon,
Thompson S. Harris,
George Jemison,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones.

I have attended a treaty of the Seneca Nation of Indians, held at Buffalo Creek, in the county of Erie, in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed, in my presence, by the chiefs of the Seneca Nation, being fairly and properly understood by them. I do, therefore, certify and approve the same.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under and by the authority of the United States of America, at Buffalo Creek, in the county of Erie, and State of New York, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council and representing and acting for the said nation, on the one part and Thomas Ludlow Ogden of the city of New

York and Joseph Fellows of Geneva in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said nation of Indians in and to the lands within the State of New York, remaining in their occupation:
Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said sachems, chiefs and warriors, on behalf of the said Tuscarora nation, did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they, the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Tuscarora nation of, in ~~and to the~~ tract, piece, or parcel of land mentioned and described in the instrument of writing next hereinafter set forth, and at the price, or sum therein specified, as the consideration or purchase money for such sale and release; which instrument being read and explained to the said parties, and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:
This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the sachems, chiefs, and warriors of the Tuscarora nation of Indians, duly assembled in council, and acting for and on behalf of the said Tuscarora nation of the first part, and Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said sachems, chiefs and warriors of the Tuscarora nation, in consideration of the sum of nine thousand six hundred dollars, to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold released, and confirmed, and by these presents do grant, bargain, sell, release and confirm to the said Thomas Ludlow Ogden and Joseph Fellows, and to their



heirs and assigns, all that tract or parcel of land situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more, or less, being the lands in their occupancy, and not included in the land conveyed to them by Henry Dearborn, together with all and singular the rights, the rights, privileges, heraditaments, and appurtenances to the said tract or parcel of land belonging, or appertaining, and all the estate, right, title, interest, claim and demand of the said party of the first part, and of the said Tuscarora nation of Indians of, in and to the same, and to every part and parcel thereof: To have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, and their heirs and assigns, to their proper use and behoof for ever, as joint tenants and not as tenants in common.
In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Tuscarora nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals, the day and year first above written.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.

Sealed and delivered in presence of—

James Stryker.
R. H. Gillet.
Charles H. Allen.
J. F. Schermerhorn.
Nathaniel T. Strong, U. S. interpreter.
H. B. Potter.
Orlando Allen.
(To the Indian names are subjoined a mark and seal.)

At the abovementioned treaty, held in my presence, as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing instrument was agreed to by the contracting parties therein named, and was in my presence executed by them; and being approved by me, I do hereby certify and declare such my approbation thereof.
Witness my hand and seal, at Buffalo Creek, this 15th day of January, in the year 1838.

J. Trowbridge, Superintendent.

I have attended a treaty of the Tuscarora nation of Indians, held at Buffalo Creek, in the county of Erie in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned and declared to be done to their full satisfaction. I do therefore certify and approve the same.

R. H. Gillet, Commissioner.
Feb. 13, 1838.

7 Stat., 561.



Supplemented article to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th of January 1838, concluded between Ransom H. Gillet, commissioner on the part of the United States, and chiefs and head men of the St. Regis Indians, concluded on the 13th day of February 1838.

Supplemental article to the treaty concluded at Buffalo Creek in the State of New York, dated January 15 1838.

The undersigned chiefs and head men of the St. Regis Indians residing in the State of New York having heard a copy of said treaty read by Ransom H. Gillet, the commissioner who concluded that treaty on that part of the United States, and he having fully and publicly explained the same, and believing the provisions of the said treaty to be very liberal on the part of the United States and calculated to be highly beneficial to the New York Indians, including the St. Regis, who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same. And it is further agreed, that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. The United States will, within one year after the ratification of this treaty, pay over to the American party of said Indians one thousand dollars, part of the sum of five thousand dollars mentioned in the special provisions for the St. Regis Indians, any thing in the article contained to the contrary notwithstanding.
Done at the council house at St. Regis, this thirteenth day of February in the year of our Lord one thousand eight hundred and thirty-eight. Witness our hands and seals.

R. H. Gillet, Commissioner.

Lover-taie-enve,
Louis-taio-rorio-te,
Michael Gaveault,
Lose-sori-sosane,
Louis-tioonsate,
Jok-ta-nen-shi-sa,
Ermoise-gana-saien-to,
Tomos-tataste,
Tier-te-gonotas-en,
Tier-sokoia-ni-saks,
Sa-satis-otsi-tsia-ta-gen,
Tier-sgane-kor-hapse-e,
Ennios-anas-ota-ka,
Louis-te-ganota-to-ro,
Wise-atia-taronne,
Tomas-outa-gosa,
Sose-te-gaomsshke,
Louis-orisake-wha,
Sosatis-atis-tsiaks,
Tier-anasaken-rat,
Louis-tar-oria-keshon,
Jasen-karato-on.

The foregoing was executed in our presence—
A. K. Williams, Agent on the part of New York for St. Regis Indians.
W. L. Gray, Interpreter.
Owen C. Donnelly.
Say Saree.
(To the Indian names are subjoined a mark and seal.)

We the undersigned chiefs of the Seneca tribe of New York Indians, residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract therewith, the same having been submitted to us by Ransom



H. Gillet, a Commissioner on the part of the United States, and fully and fairly explained by him, to our said tribe, in council assembled.

Dated Buffalo Creek September 28 1838.

Captain Pollard,
Captain Strong,
White Seneca,
Blue Eyes,
George Bennett,
Job Pierce,
Tommy Jimmy,
William Johnson,
Reuben Pierce,
Morris Halftown,
Levi Halftown,
George Big Deer,
Jim Jonas,
George Jimeson,
Thomas Jimeson,
George Fox,
N. T. Strong,
Thompson S. Harris,
Samuel Gordon,
Jacob Jimeson,
John Gordon,
Tall Peter,
Billy Shanks,
James Stevenson,
Walter Thompson,
John Bennett,
John Seneca,
John General,
Major Jack Berry,
John Tall Chief,

Jabez Stevenson.
(To the Indian names are subjoined marks.)

The above signatures were freely and voluntarily given after the treaty and amendments had been fully and fairly explained in open council.

R. H. Gillet, Commissioner.

Witness:
H. A. S. Dearborn, Superintendent of Massachusetts.
James Stryker, U. S. Agent.
Little Johnson,
Samuel Wilson,
John Buck,
William Cass,
Long John,
Sky Carrier,
Charles Greybeard,
John Hutchinson,
Charles F. Pierce,
John Snow.
(To the Indian names are subjoined marks.)

These ten chiefs signed in my presence except the last John Snow.

H. A. S. Dearborn,
Superintendent of Massachusetts.

Signed in presence of—
Nathl. T. Strong, U. S. Interpreter.
James Stryker, U. S. Agent.
George Kenququide, by his attorneys.
N. T. Strong.
White Seneca.



The signature of George Kenququide was added by his attorneys in our presence.

R. H. Gillet,
James Stryker.

18th January 1839.
We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.
Dated August 9th 1838 at the Oneida Council House.

Executed in the presence of—
Timothy Jenkins.

First Christian Party:
Baptista Powlis,
Anthony Big Knife,
Peter Williams,
Jacob Powlis,
Anthony Anthony,
Peter Martin,
Cornelius Summer,
Isaac Wheelock,
Thomas Doxtater,
William Hill,
Baptiste Denny.
Orchard Party:
Jonathan Jordon,

Thomas Scanado,
Henry Jordon,
William Day.
Second Christian Party:
Abraham Denny,
Adam Thompson,
Peter Elm,
Lewis Denny,
Martin Denny.
(To the Indian names are subjoined marks.)

The above assent was voluntarily freely and fairly given in my presence, after being fully and fairly explained by me.

R. H. Gillet, Commissioner, &c.

We the undersigned sachems chiefs and head men of the Tuscarora nation of Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract connected therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.
Dated August 14th, 1838.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Patterson,
Matthew Jack,
George L. Printup,
James Cusick,
Jonathan Printup,
Mark Jack,



Samuel Jacobs.

Executed in presence of—
J. S. Buckingham,
D. Judson,
Leceister S. Buckingham,
Orlando Allen.
(To the Indian names are subjoined marks.)

The above assent was freely and voluntarily given after being fully and fairly explained by me.

R. H. Gillet, Commissioner.

We the undersigned chiefs and head men of the tribe of Cayuga Indians residing in the State of New York do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.
Dated August 30th 1838.

Thomas Crow,
John Crow,
Ghastly Darkness,
Jacob G. Seneca.

Executed in presence of—
James Young.
(To the Indian names are subjoined marks.)

The above four signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

We the undersigned sachems, chiefs and head men of the American party of the St. Regis Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled. The St. Regis Indians shall not be compelled to remove under the treaty or amendments.
Dated October 9th, 1838.

Lorenn-taie-enne,
Sase-sori-hogane,
Louis-taw-roniate,
Thomas-talsete,
Saro-sako-ha-gi-tha,
Louis-te-ka-nota-tiron,
Michael Gareault,
W. L. Gray, Int.
Louis-tio-on-sate,
Tier-ana-sa-ker-rat,
Tomas-ska-en-to-gane,
Tier-sa-ko-eni-saks,
Saro-tsio-her-is-en,
Sak-tho-te-ras-en,
Saro-saion-gese,
Louis-onia-rak-ete,
Louis-aion-gahes,
Sak-tha-nen-ris-hon,
Sa-ga-tis-ania-ta-ri-co,
Louis-sa-ka-na-tie,
Sa-ga-tis-asi-kgar-a-tha,



Simon-sa-he-rese,
Resis-tsis-kako,
Ennias-kar-igiio,
Sak-tsior-ak-gisen,
Tier-kaien-take-ron,
Kor-ari-hata-ko,
Tomas-te-gaki-gasen,
Saro-thar-on-ka-tha,
Ennias-anas-ota-ko,
Wishe-te-ka-nia-tasoken,
Tomas-tio-nata-kgente,
wishe-aten-en-rahes,
Tomas-ioha-hiio,
Ennias-kana-gaien-ton,
Louis-taro-nia-ke-thon,
Louis-ari-ga-ke-wha,
Sak-tsio-ri-te-ha,
Louis-te-ga-ti-rhon,
Tier-atsi-non-gis-aks.

The foregoing assent was signed in our presence.

R. H. Gillet, Commissioner.

Witnesses:
James B. Spencer.
Heman W. Tucker.
A. K. Williams, Agent St. Regis Indians.
Frs. Marcoux Dictre.
(To the Indian names are subjoined marks.)

We the undersigned, chiefs, head men and warriors of the Onondaga tribe of Indians residing on the Seneca reservations in the State of New-York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of

June, 1838, the same having been submitted to us, by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.
Dated August 31st, 1838.

Silversmith,
Noah Silversmith,
William Jacket.

(To the Indian names are subjoined marks.)

The above signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.



**18 U.S.C. § 1151**

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 53--INDIANS
§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights- of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 5--PROTECTION OF INDIANS
§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.





UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 6--GOVERNMENT OF INDIAN COUNTRY AND RESERVATIONS
SUBCHAPTER I--GENERALLY
§ 233. Jurisdiction of New York State courts in civil actions

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: Provided, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes,

to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.





UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 14--MISCELLANEOUS
SUBCHAPTER V--PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES
§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for

which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Supreme Court, U.S.
FILED
JAN 2 0 2004
OFFICE OF THE CLERK

(3)

No. 03-855

IN THE

# Supreme Court of the United States

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CITY OF SHERRILL, NEW YORK,
*Petitioner*,

v.

ONEIDA INDIAN NATION OF NEW YORK, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed on the cover of the Petition, Madison County was the defendant in a parallel action to enjoin its tax levies on Nation land, referred to as the "Related Case" by the Second Circuit and by the District Court. (Pet. App. A3, 64). The Second Circuit's judgment vacated the district court's entry of judgment on the pleadings against Madison County, and remanded for further proceedings consistent with its opinion. (*Id.* at A53).

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## STATEMENT

In 1985, the Court decided that federal law protects the right of the Oneida Indian Nation of New York to possess reservation lands previously alienated by the State of New York without the consent of the federal government. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985) (*Oneida II*). In 1997 and 1998, the Oneida Indian Nation of New York, through voluntary market transactions, reacquired possession of a small amount of such land in the City of Sherrill. Despite the rule forbidding state and local taxation of Indian reservation land, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), Sherrill levied property taxes on the Oneidas. When the Oneidas did not pay the taxes, Sherrill took title to the Oneidas' land through a foreclosure and threatened to evict the Oneidas. The Oneidas sought the protection of the United States District Court for the Northern District of New York, which enjoined Sherrill's taxation of the Oneidas' land. The Second Circuit affirmed, holding that the Oneidas' land is reservation land protected by federal law from state and local taxation. The Second Circuit's decision is not in conflict with any decision of this Court or of any Circuit. It is a correct application of the particular principles regarding the Oneidas' continuing rights that were settled in *Oneida II*. The United States, which has intervened in the pending Oneida land claim litigation, agrees that the Oneidas' land remains a reservation protected by federal treaties and denies that the reservation was disestablished. (Resp. App. 25a-41a).

### A. *Oneida I* and *Oneida II*

In 1970, the Oneidas filed a test case against Madison County and Oneida County (in which Sherrill is located). The Oneidas asserted a federal common law claim for trespass on certain Oneida reservation land. The Oneidas alleged that New York had caused the alienation of that land

in violation of federal law, that some of the land was then in the Counties' possession, that the Oneidas retained federally-protected possessory rights and that the Counties were trespassers liable for rental damages for 1968 and 1969.

In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974) (*Oneida I*), this Court reversed a dismissal for lack of subject matter jurisdiction. The Court held that the Oneidas could assert a federal common law claim for relief from the Counties' current trespasses. The Court explained that federal treaties with the Oneidas, the Constitution's commitment of Indian relations to the federal government and the Nonintercourse Act, 25 U.S.C. § 177, all protect the Oneidas' Indian title, a right of occupancy that can be extinguished only by the federal government. 414 U.S. at 667-74; *see also Oneida II*, 470 U.S. at 235-36 (referring to Indian title also as "aboriginal rights" and "possessory rights").

On remand, the district court conducted a trial and entered judgment requiring the Counties to pay trespass damages for 1968 and 1969. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977). The court found that the Oneida Indian Nation of New York is "the direct descendant[]" of the Oneida Indian Nation and is a tribe retaining its federally-protected rights in land. *Id.* at 538. The Second Circuit affirmed. *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 539 (2d Cir. 1983).

In *Oneida II*, this Court affirmed in all relevant respects. The Court granted review because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims." 470 U.S. at 230. The Court observed that the Oneida Indian Nation of New York is "the direct descendant[]" of the Oneida Indian Nation and held that the Oneidas' possessory rights persist in land alienated without the requisite federal



approval. 470 U.S. at 230-34. The Court acknowledged "the potential consequences of its decision." 470 U.S. at 253.

In the wake of *Oneida II*, final judgment awarding trespass damages was entered in the test case. Litigation remains pending regarding the rest of the Oneida land that New York caused to be illegally alienated. *Oneida Indian Nation v. State of New York*, No. 74-CV-187 (N.D.N.Y.). The United States has intervened as plaintiff to sue New York for all damages owed to the Oneidas. In its reply to New York's counterclaim for a declaration that the Oneidas' reservation was disestablished, "the United States takes the position that the reservation has not been disestablished. * * * No federal statute or treaty disestablished or diminished the boundaries of the Oneida Reservation as acknowledged by the 1794 Treaty of Canandaigua and by other federal treaties." (Resp. App. 26a).

### B. Federal Protection of Oneida Lands

Because the Oneidas fought beside the United States in the American Revolution, *Oneida II*, 470 U.S. at 231, Congress passed a resolution in 1783 "to reassure [the Oneidas] of the friendship of the United States and that they may rely on that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think it for their own advantage to dispose of the same." 25 J. Cont'l. Cong. 681, 687 (Oct. 15, 1783).

In 1784, when the Oneidas occupied about six million acres of land, *Oneida II*, 470 U.S. at 230, the United States made a treaty that "secured [the Oneidas] in the possession of the lands on which they are settled." Treaty with the Six Nations [Ft. Stanwix], Art. II, 7 Stat. 15 (Oct. 22, 1784); *Oneida II*, 470 U.S. at 231.

In 1785 and 1788, New York purchased more than five million acres of the Oneidas' lands. "The Oneidas

retained a reservation of about 300,000 acres" in the 1788 state treaty, *Oneida II*, 470 U.S. at 231, to "hold to themselves and their posterity forever for their own use and cultivation" (Pet. App. A137). The 1788 state treaty described the boundaries of the Oneida reservation, Treaty with the Oneida Indians [Ft. Schuyler], (Pet. App. A136-38), which include the land at issue in this case.

In 1789, the United States confirmed the Oneidas in the possession of their lands – the 300,000 acres reserved in 1788. Treaty with the Six Nations [Ft. Harmar], Art. 3, 7 Stat. 33 (Jan. 9, 1789); 470 U.S. at 231 & n.1.

In 1794, the United States entered the Treaty with the Six Nations [Canandaigua], 7 Stat. 44 (Nov. 11, 1794); Pet. App. A141-46; *Oneida II*, 470 U.S. at 231. It protects the Oneidas' "reservation" and "property:"

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same nor disturb them * * * in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

(Pet. App. A141). Articles VI and VII also provided for a superintendent to resolve disputes and to provide an annuity, (*id.* at A143-44), which the United States continues to deliver to the Oneida Indian Nation of New York. (CA JA 1506-18).

In addition to treaty protection of the Oneidas' lands, the First Congress enacted the Nonintercourse Act in 1790, forbidding purchases of Indian land "except where such conveyances were entered pursuant to the treaty power of the



United States." *Oneida II*, 470 U.S. at 231-32 & n.2. Congress enacted a "stronger, more detailed version of the Act" in 1793 and reenacted substantially identical legislation in 1796, 1799, 1802 and 1834. *Oneida II*, 470 U.S. at 232 & 245-46; *see Oneida I*, 414 U.S. at 668 n.4. Every version of the Act has provided for the appointment of federal commissioners to superintend transactions in land covered by the Act. *See* 25 U.S.C. § 177 (current version).

### C. State Alienation of Oneida Lands

"Despite Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the federal government, in 1795 the State of New York began negotiations to buy the remainder of the Oneidas' land." *Oneida II*, 470 U.S. at 232. No one argues that any alienation of the Oneidas' reserved land complied with any of the requirements of the Nonintercourse Act, except perhaps sales in 1798 and 1802 involving a federal commissioner. 470 U.S. at 246-47 & nn.19-20 (discussing validity of 1798 and 1802 treaties); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 535 (N.D.N.Y. 1977) (from 1795 to 1846, only two sales involved federal commissioners).

The City of Sherrill does not claim that the alienation of the lands at issue here complied with the Nonintercourse Act. In 1805, New York, without federal approval, concluded a treaty that provided for the division of Oneida lands. Then, in 1807, New York (again without federal approval) enacted a law giving one Oneida member a fee patent, enabling him to sell to a non-Indian land speculator. (CA JA 407-15).

## D. 1838 Treaty of Buffalo Creek

In 1838, a United States Commissioner negotiated the Treaty of Buffalo Creek with "the New York Indians," which included the Oneidas and several other tribes. Treaty with the New York Indians [Buffalo Creek], 7 Stat. 550 (1838) (Pet. App. A147-78). At the time, the Oneidas had possession of about 5,000 acres of land. (Pet. App. A13). The lands in Sherrill, like most of the Oneidas' lands, had been transferred from Oneida possession more than three decades earlier. The Treaty of Buffalo Creek did not refer to any of the prior transfers of Oneida land.

Article 1 of the treaty ceded to the United States most of the land the New York Indians previously had acquired in Wisconsin with the federal government's assistance. (Pet. App. A149). Article 2 set apart land in Kansas as a permanent home for the New York Indians "[in] consideration of [the] cession and relinquishment" of Wisconsin land in Article 1. (*Id.*); *New York Indians v. United States,* 170 U.S. 1, 19 (1898) (*New York Indians II*). Article 3 provided for the forfeiture of the Kansas land of such tribes "as do not accept or agree to remove" there "within five years or such other time as the President may, from time to time, appoint." (*Id.* at A150). As to New York land, the treaty ceded Seneca land described in Article 10 (*id.* at A153-54) and Tuscarora land described in Article 14. (*Id.* at A155-56). The treaty did not forfeit or cede Oneida land in New York. Article 13 conditioned the Oneidas' removal on a future agreement to sell land to New York. They "agree to remove to their new homes in the Indian territory as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." (*Id.* at A155).

The Senate amended the treaty and instructed the federal treaty commissioner to return to each of the signatory



tribes to gain assent to the altered treaty after "fully and fairly explaining" it. *New York Indians II*, 170 U.S. at 21; Sen. Exec. J. 130-31 (June 11, 1838). Commissioner Ransom Gillet then met with the Oneidas on August 9, 1838 (Pet. App. A173) (treaty recites that Gillet "fully and fairly" explained it to the Oneidas). To dispel the Oneidas' fears that "they might be compelled to remove, even without selling their land to the State," S. Rep. Confidential B, 26th Cong., 1st Sess. 29-30 (1840) (Resp. App. 5a-9a), Gillet provided the Oneidas with a formally attested writing that later went to the Senate with the treaty.

> In order to prevent all mistakes and to counteract all misapprehensions concerning the purport of the treaty * * * with amendments that have been this day assented to by * * * the Oneidas at Oneida Castle[,] I hereby most solemnly assure them that the treaty does not and is *not intended to compel the Oneidas to remove from their reservation in the State of New York* to the west of the State of Missouri or elsewhere unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. They can if they choose to do so remain where they are forever. When they wish to remove they can sell their lands to the Governor of the State of New York & then emigrate. But they *will not be compelled to remove*.

(Resp. App. 10a) (emphasis added). The Oneidas assented to the treaty as explained (Pet. App. A173-174), and the Senate approved the treaty by a majority vote only. (CA JA 1579). President van Buren nevertheless proclaimed the amended treaty. (CA JA 1582).

The President never specified a deadline or "made a formal tender of performance" of the promise to assist the

New York Indians in moving to Kansas, and Congress never appropriated the promised funds to pay for removal. *New York Indians II*, 170 U.S. at 28-29. The United States discouraged an attempt by some New York Indians to remove. (CA JA 1343). A federal commissioner also assured the New York Indians in 1846 that they did not have to remove. (CA JA 1327). By 1859, the United States restored the Kansas land to the public domain, making removal impossible. *New York Indians II*, 170 U.S. at 31 & n.17. The New York Indians later recovered for the failure of the Kansas-Wisconsin exchange. *United States v. New York Indians*, 173 U.S. 464 (1899).

### E. *Boylan* Litigation

In 1906, after foreclosure on a mortgage, an action to partition thirty-two acres of the remaining Oneida land and to evict the Oneidas commenced in state court. *United States v. Boylan*, 256 F. 468, 473-74 (N.D.N.Y. 1919). New York weighed in on the side of the Oneidas. The Attorney General reported to the court, at the request of Governor Charles Evans Hughes, that the Oneidas remained in possession of the land and that "[t]he present generation constitute, in fact, a band, with chiefs or head men, who speak for them, and claim tribal rights." (Resp. App. 15a). The Attorney General further reported that, "[n]o tax has ever been laid on the thirty-two acres of land under any state authority. No record has been found of any authority for an entry to be made upon this land, in hostility to the Indian possession. The Attorney-General has been unable to discover that there is anyone who disputes the matter above referred to, by way of facts." (*Id.* at 16a). Having received this report, the court ruled for the Oneidas, but an appellate court reversed on procedural grounds and ordered a partition, with the result that the Sheriff forcibly evicted the Oneidas. *Boylan v. George*, 117 N.Y.S. 573 (N.Y. App. Div.); *see United States v. Boylan*, 256 F. at 475-76.



In 1915, the United States filed suit as trustee for the Oneidas, seeking recovery of the Oneidas' land. The United States asserted that the Oneidas remained "dependents and wards of the United States" entitled to possession of their land. (Complaint, reproduced in Appendix, *Boylan v. United States*, at 4a, No. 458 (O.T. 1920)). The district court heard testimony concerning the tribal status of the Oneidas and their rights in Oneida land. (*Id.* at 13a- 63). The court held that "the Oneida reservation still existed," that the Oneidas' Indian title in the thirty-two acres had not been eliminated and that such lands were held by that title and "were not lands conveyed to them, or set apart for them, by the state of New York from its own possessions." 256 F. at 481. The court further held that the Oneidas continued their tribal existence and that they must be restored to possession. 256 F. at 494-96.

The Second Circuit affirmed, holding that the "Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward" and that the State of New York could not "extinguish the right of occupancy which belongs to the Indians." *United States v. Boylan*, 265 F. 165, 174 (2d Cir. 1920), *dismissed for want of jurisdiction*, 257 U.S. 614 (1921) (untimely appeal). The Oneidas then regained possession of the land, which they retain today. (Pet. App. A43).

### F. Proceedings Below

The Oneidas reestablished possession of the land at issue here through voluntary market transactions in 1997 and 1998. After Sherrill foreclosed for non-payment of property taxes and threatened eviction, (CA JA 36-37), the Oneidas filed suit in federal court. The court entered judgment in favor of the Oneidas, enjoining Sherrill's property tax enforcement. (Pet. App. A61-133).

The Second Circuit affirmed. (Pet. App. A1-60). The court concluded that the Oneida land was part of the reservation protected in the federal Treaty of Canandaigua and is therefore Indian country under 18 U.S.C. § 1151. (*Id.* at A24-25 & n.13). The court held that the reservation land was a "carve-out" from the cession in the 1788 state Treaty of Ft. Schuyler "represent[ing] that portion of the Indian's aboriginal homeland that had not been conveyed to New York and thus never became state land." (*Id.* at n.13). The court further held that the 1794 federal Treaty of Canandaigua set aside the land for the Oneidas, that the Oneidas retained a tribal right of possession never extinguished by the United States and that, with reacquisition of the land, the Oneidas continue to hold it by that right of possession. (*Id.* at A23-28).

The Second Circuit also held that the Oneida reservation in New York was not disestablished by the Treaty of Buffalo Creek (*id.* at A33-41), concluding that there was not "substantial and compelling" evidence of an intent to disestablish. (*Id.* at A34). The court explained that the treaty did not effect or require any cession of Oneida land in New York. As to the Oneidas, "removal was conditioned on speculative future arrangements between the Indians and a third party." (*Id.* at A35). The court noted that Article 3 contemplated that some of the New York tribes might not accept land in Kansas, for which they would forfeit the interest in Kansas land, not New York land. (*Id.* at A36). The court also recognized that Commissioner Ransom Gillet's unequivocal assurance to the Oneidas that the treaty did *not* mandate removal from New York was relevant to the Oneidas' understanding of the treaty. *Id.* at A35-36 & n.18 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)). The court further explained that the damage award received by the Oneidas for the government's breach of its promise to exchange Kansas land for land in Wisconsin (*New York Indians II*, 170 U.S. at 2),



did not imply disestablishment of the New York reservation. (*Id.* at A40). The Second Circuit observed that the dispersal of many New York Oneidas could not show a disestablishment by the 1838 treaty because most of the dispersal was due to illegal state transactions occurring long before the Treaty of Buffalo Creek. (*Id.* at A39-40).

Finally, the Second Circuit rejected Sherrill's claim that the entire reservation was stripped of Indian country status by a lapse in tribal continuity. The court noted that this Court recognized the Indian country status of Choctaw land even though the tribe was "merely a remnant of a larger group of Indians, long ago removed * * * [and] federal supervision over them had not been continuous." (Pet. App. A42) (quoting *United States v. John*, 437 U.S. 634, 653 (1978)). Alternatively, the court concluded that the record showed continuous tribal existence. (Pet. App. A43-44).

## REASONS FOR DENYING THE PETITION

The Second Circuit's decision does not conflict with a decision of this Court or of any Circuit. To the contrary, the Second Circuit's decision accords with *Oneida II*, which established that the Constitution, federal statutes and federal treaties protected the Oneidas and their reservation and that the United States never terminated that protection. Although Sherrill alleges a conflict with *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), that case concerned a question completely irrelevant here – whether a statutorily terminated reservation could become Indian country. The Second Circuit correctly explained and applied the *Venetie* decision, as well as the other Circuit decisions mentioned by Sherrill regarding tribal continuity. (Pet. App. A23-25, A42-45).

Sherrill really is not challenging the legal principles applied by the Second Circuit, but the result, which is the logical consequence of *Oneida II*. In *Oneida II*, the Court

specifically observed that its decision had important consequences. 470 U.S. at 253. One is that the federally-protected possessory rights entitling the Oneidas to trespass damages when the Oneidas do not have possession of their lands also entitle the Oneidas to federal protection against state and local taxation of tribal lands in Oneida possession. Local governments liable to the Oneidas as trespassers on Oneida land cannot reasonably claim the right to tax the land when it is in the hands of the Oneidas.

The Second Circuit's decision approves the least disruptive way to give meaning to rights recognized in *Oneida II*. The rationale for denying ejectment as a remedy has been that monetary damages are an adequate remedy to provide a "homeland" through future purchases. *Cayuga Indian Nation v. Cuomo*, 1999 WL 509442, at 23-24 (N.D.N.Y. July 1, 1999), *appeal pending*, No. 01-7795 (2d Cir.); *cf. Oneida II*, 470 U.S. at 253 n.27 (equitable considerations may limit relief for trespass on tribal possessory right); *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 518 n.5 (1986) (Blackmun, J., dissenting, joined by Marshall and O'Connor, JJ.) (right to be restored to immediate possession may be limited by equitable considerations). If the Oneidas retain tribal possessory rights but may not enjoy them after acquiring possession of land in market transactions, then ejectment would be the only land claim remedy that could effectuate the Oneidas' rights.

### A. Federal Laws and Treaties Protected the Oneidas' Land as a Reservation Beginning in the 1780s.

Contending that a 1788 state treaty precluded federal protection of the Oneidas' land, Sherrill relies on *Alaska v. Native Village of Venetie*, to argue that the Oneidas' land was not within a federal Indian reservation when it was alienated in 1805-07.



*Venetie* says nothing to undermine the Indian country status of Oneida land. In *Venetie*, the Court addressed the status of land within a reservation that had been explicitly disestablished by federal statute, holding that Indian country status could not be revived by tribal purchase of lands within the former reservation. The Native Village of Venetie did not – in the face of express statutory termination – even claim "reservation" protection under 18 U.S.C. § 1151(a), arguing instead that its presence made the land a "dependent Indian community" under 18 U.S.C. § 1151(b).[1] The Court rejected the argument as inconsistent with the statute disestablishing the reservation. This case involves no such facts or legal issue. Congress never terminated the Oneida reservation.[2]

The Oneidas' land fits the statutory definition of Indian country, which includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a); *see Donnelly v. United States*, 228 U.S. 243 (1913); Felix Cohen's Handbook of Federal Indian Law, 34-35 (Rennard Strickland ed., 1982) (discussing various forms of Indian reservations). The Oneida reservation was acknowledged by a Congressional resolution and by three federal treaties. 25 J. Cont. Cong.

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[1] Section 1151 classifies as Indian country "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * * (b) all dependent Indian communities * * * and (c) all Indian allotments, the titles to which have not been extinguished, including rights-of-way running through the same." The statute is reproduced at Pet. App. A179.

[2] Sherrill refers to *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999), and *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993), (Pet. 17), but does not actually say they create a Circuit split, which they do not. Neither decision involved land within a federally-protected reservation.

681, 687 (Oct. 15, 1783) (Oneida lands "reserved for their sole use and benefit"); Treaty with the Six Nations [Ft. Stanwix], 7 Stat. 15 (Oct. 22, 1784) (Oneidas "secured in the possession of the lands on which they are settled"); Treaty with the Six Nations [Ft. Harmar], 7 Stat. 33 (Jan. 9, 1789) (Oneidas "are also again secured and confirmed in the possession of their . . . lands"); Treaty with the Six Nations [Canandaigua], 7 Stat. 44 (Nov. 11, 1794) (acknowledging "what lands belong to the Oneidas" and assuring their "free use and enjoyment" as their "reservation[]" and "property").

Sherrill now argues that the federal government was powerless to recognize Oneida land as Indian country, citing a state treaty, the 1788 Treaty of Ft. Schuyler. Sherrill claims it extinguished the Oneidas' title and left nothing subject to the protection of federal law. Sherrill's argument is a sharp detour from the central argument it made below, which was that *Venetie* requires a fresh federal set aside of land after the Oneidas regain actual possession. Moreover, Sherrill first cited the 1788 treaty in a post-argument letter to the Second Circuit, which undermines claims that the treaty clearly extinguishes the Oneidas' rights. If that were clear, the 1788 treaty argument would not have been added as an afterthought. The treaty was not obscure. This Court referred to it in *Oneida II*, 470 U.S. at 231.

Federal law would protect Oneida land, which is a reservation under 18 U.S.C. § 1151 even if Sherrill were correct that the 1788 state treaty created an Oneida reservation. No matter what New York did in 1788, the United States asserted its jurisdiction over the Oneidas' lands and protected them as the Oneida reservation. Following three assertions of such jurisdiction and protection in the 1783 Congressional resolution, the 1784 Treaty of Ft. Stanwix and the 1789 Treaty of Ft. Harmar, the 1794 Treaty of Canandaigua explicitly acknowledged and protected the lands reserved in the 1788 treaty. That protection was not less than



the protection given in the same treaty to the Senecas' land, a protection recognized in *New York Indians*, 72 U.S. 761 (1866) (*New York Indians I*), to prohibit state property taxes.[3]

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[3]The County amici (Br. at 11) claim that the Treaty of Canandaigua should not be read to protect Oneida land in deference to state property rights assertedly created in the 1788 state treaty, citing *United States v. Minnesota*, 270 U.S. 181 (1926). That case involved the effect of a later Indian treaty on state land, requiring a clear statement before the Indian treaty would be construed to take state property. There is no state property interest at issue here. Under the Constitution, a state did not have a property right to tax land occupied by an Indian tribe, and New York never claimed such a right. See N.Y. Indian Law § 6. Nor did it have any authority to govern or regulate an Indian tribe, which the Constitution made an exclusively federal power. *Oneida II*, 470 U.S. at 234 ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.") Construing the Treaty of Canandaigua to prohibit state taxation of Oneida land does not affect a state property interest in the reserved land, if there was one. For the same reason, it is irrelevant that Attorney General Wirt concluded that the Treaty of Canandaigua did not "divest[]" New York of its title to "any of the lands then occupied by the Six Nations," in an 1819 opinion dealing with sales of timber on Seneca land. *Minnesota* also has absolutely no bearing on whether the 1788 state treaty should be construed to reserve land to the Oneidas or cede it with a grant of occupancy back to the Oneidas. *Minnesota* concerns the effect of a federal treaty on state property rights, not the effect of a state treaty on the rights of an Indian tribe.

The County amici also raise arguments about the Nonintercourse Act and the Tenth Amendment that were not raised or decided below and are not fairly included in the questions presented. (County Br. 14-20). Those arguments are without merit and should be disregarded.

Sherrill acknowledges that *New York Indians I* recognized the tax immunity of Seneca land referred to in the Treaty of Canandaigua. (Pet. 16). Sherrill therefore contends that Article II of the treaty offered less protection to Oneida land than Article III offered to Seneca land. Sherrill offers no reason to think that the treaty was meant to give less protection to the Oneidas' lands, which already were protected by two prior federal treaties. Article II and Article III both use the term "acknowledge" to refer to the "property" of the Oneidas and the Senecas. Article IV then confirms the equivalence of federal protection of Oneida and Seneca land, saying that "[t]he United States ha[d] thus described and acknowledged what lands belong to the Oneidas * * * and Senekas." (Pet. App. A141-43).

State protection does not preclude federal protection. Even reservations established by sovereigns other than the United States come under the protection of federal law once the reservation is part of the United States. *United States v. Candeleria*, 271 U.S 432, 442 (1926) (United States could sue to challenge alienation of Pueblo Indian land previously set aside under Mexican law and held in fee simple by tribe); Felix Cohen's Handbook of Federal Indian Law, 34-35 n.66 (1982 ed.) (term "reservation" describes "federally-protected Indian tribal lands without any particular dependence on source").

No matter how one characterizes "title" under the 1788 treaty, the treaty guarantees that the Oneidas "shall hold to themselves and their posterity forever for their own use and cultivation," the lands referred to as reserved. (Pet. App. A137). That interest always has been protected from alienation by the Nonintercourse Act. 25 U.S.C. § 177 (prohibiting conveyance "of lands, or of any title or claim thereto from any Indian nation"). Thus, in 1795, Secretary of War Timothy Pickering sent to the New York Governor the opinion of Attorney General William Bradford stating that



lands held by the Oneidas after the 1788 state treaty were restricted by federal law and that New York could not cause their alienation except "by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress." (Resp. App. 1a-4a). The United States also asserted its jurisdiction when it sued in *Boylan*, 256 F. at 477 ("the United States does contend that it had jurisdiction over these Indians"), and in the current land claim litigation, (Resp. App. 31a).[4]

In any event, Sherrill's premise regarding the meaning of the 1788 state treaty is incorrect. The Second Circuit correctly held that the Oneidas reserved title to the reservation and were not simply given state land to live on. (Pet. App. A24). In *Oneida II*, the Court observed that, through the 1788 treaty, the State "purchased the vast majority of the Oneidas' land. The Oneidas retained a reservation of about 300,000 acres." 470 U.S. at 231. The court then held that the Oneidas' reserved Indian title remains intact and subject to the continuing protection of federal law. Thus, Sherrill's interpretation of the 1788 treaty and its effect on the Oneidas' federal rights is at odds with this Court's decision in *Oneida II*.

The Second Circuit's reading of the 1788 treaty is fully consistent with, indeed compelled by, *United States v.*

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[4]Sherrill asserts that the Oneidas' land today is "free from any and all federal government restrictions." (Pet. 17). The point makes no sense in light of *Oneida II*, which held that the Oneidas retained federally-protected rights in their lands in 1968 and 1969 and affirmed a judgment awarding trespass damages for those years. If the Oneidas had possession in 1968 and 1969 of the lands at issue in *Oneida II*, then the same principles of federal law that protected the Oneidas' title and made the Counties trespassers would have restricted alienation of the land without federal consent.

*Winans*, 198 U.S. 371, 381 (1905) (tribal fishing rights were reserved, not granted, in treaty that "ceded" "all right, title and interest in and to the lands" and then "secured" fishing rights), and *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832) (treaty must be read to concern the "dividing line" between tribal lands and ceded lands, such that treaty term "allotting" land to tribe did not grant the land, which must be understood as reserved by tribe); *id.* at 582 (M'Lean, J., concurring), *see Oneida Indian Nation v. New York*, 194 F. Supp.2d 104, 140 (N.D.N.Y. 2002) ("simply makes no sense" to read 1788 treaty as ceding reserved lands); *Boylan*, 256 F at 481 (Oneida lands "not lands conveyed to them, or set apart for them, by the state of New York from its own possessions").[5]

The Second Circuit's reading is also consistent with New York's own understanding. There is no evidence that New York ever objected to the making of the Treaty of Canandaigua or to its guarantee that the Oneida reservation was the Oneidas' "property." When the State later sought to subdivide the Oneidas' land after 1843, it called the

[5]The County amici refer (Br. at 10) to arbitrators' interpretation of a similar Cayuga treaty. British and American Claims Arbitration Tribunal, 20 Am. J. Int'l Law 574, 590 (1926). The arbitrators decided that the Cayugas did not reserve land but that New York set up a Cayuga reservation after Cayuga cession. The arbitrators explained that treaties are interpreted as unsophisticated Indians understand them and thus that the literal meaning of the cession language should be given effect. This is inconsistent with the decisions in *Winans* and *Worcester*, which found tribal understanding regarding reservation in the context and function, not the literal words, of treaties drafted by non-Indians. Further, the premise of the arbitrators' decision is undermined by *Oneida II*, in that the arbitrators decided that state law controlled sale of tribal land after the Constitution.



remaining Oneida land "the residue of the said reservation *not now nor heretofore ceded to the people of the said state*." *United States v. Boylan*, 265 F. 165, 168 (2d Cir. 1920) (quoting 1842 state treaty) (emphasis added); *see* New York Assembly, Report of Special Committee to Investigate the Indian Problem of the State of New York, at 8 (Feb. 1, 1889) ("In 1788, September 12, the Oneidas by treaty ceded to the State all their lands excepting certain reservations in Oneida and Madison counties."). The references of the County amici (Br. at 9-10) to Chancellor Kent's decision in *Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823), do not undermine New York's understanding of the 1788 treaty, as there was no issue before the court in that litigation concerning the Oneidas' tribal rights in their reservation land.[6]

[6]Sherrill also suggests absence of federal superintendence. (Pet. 16-19). The 1794 Treaty of Canandaigua provided for a federal superintendent. Federal superintendence also flows from the treaty promises of the United States to protect Oneida lands. It is evident in the actions of the United States on the Oneidas' behalf in *Boylan* and in the pending Oneida land claim litigation. Sherrill recognized federal superintendence when it asked for 25 U.S.C. § 81 approval of a utility easement on the Oneidas' land in Sherrill. (CA JA 460-63 & 1527). Nothing in the Second Circuit's opinion concerning federal superintendence is in conflict with *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), or *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000), which addressed only the existence of an "informal reservation" in the absence of a treaty.

## B. The 1838 Treaty of Buffalo Creek Did Not Disestablish the Oneida Reservation.

Sherrill asserts that Treaty of Buffalo Creek clearly disestablished the Oneida reservation. That clarity escaped Sherrill when it moved for summary judgment in the district court, writing then that "Congress itself was not responsible for revoking OIN's alleged reservation." (CA JA 284).

Sherrill proposes that the Treaty of Buffalo Creek should be interpreted to be an "obligatory removal" treaty (Pet. 6), which, although it does not refer to the land at issue here, must be read to strip the Oneidas of their rights in that land. The assurances of the United States to the Oneidas, however, demonstrate conclusively that the treaty did not require Oneida removal from New York, and that same conclusion also is compelled by the terms of the treaty.

The Oneidas assented after Commissioner Ransom Gillet explained the treaty's meaning in a formally attested document, and that explanation accompanied the treaty when it was submitted to the Senate. (Pet. App. A35-36 n.18). Gillet wrote: "[T]he treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York… unless they shall hereafter voluntarily sell their lands where they reside & agree to do so... [t]hey will not be compelled to sell or remove." (Resp. App. 10a). This Court interprets "Indian treaties as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 196 (1999). The Indians would have understood a treaty as it was explained to them by a federal commissioner. *Id.* at 197-199.

The terms of the treaty were consistent with Gillet's promises. The treaty (Pet. App. 147-48) contained no cession



of Oneida lands in New York.[7] Article 1 ceded Wisconsin lands of the New York Indians, and Article 2, "[i]n consideration of the above cession and relinquishment," provided for the United States to remove the New York Indians to Kansas and to have "a permanent home" there. Article 3 then provided for forfeiture of Kansas lands for any New York Indians who did not remove to Kansas, implying that removal was not obligatory and that there would be no forfeiture of New York lands. Then, in Article 13, which specifically addressed the Oneidas, the treaty conditioned their removal on "mak[ing] satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Nothing in the treaty obligated them to make those arrangements. It is clear from the record in *Boylan* that the Oneidas did not sell all of their land and remove from New York. Instead, they did what Commissioner Ransom Gillet told them they could do: keep their land and stay on their New York reservation.

Because the treaty does not refer to the land in issue here, Sherrill is necessarily asking that the Treaty of Buffalo Creek be construed as ratifying all pre-1838 sales of Oneida land. That argument founders on *Oneida II*'s rejection of just such a ratification argument in the absence of plain and unambiguous ratifying language. 470 U.S. at 246-48 & n.19 (references to earlier sales not a ratification of them); *see Minnesota v. Mille Lacs Band*, 526 U.S. at 200-202 (rejecting argument that subsequent treaty and statute extinguished prior treaty rights not mentioned); *see also Oneida II*, 470 U.S. at 269 n.24 (Stevens, J., dissenting) (referring to Treaty of Buffalo Creek); *Oneida Indian Nation v. County of Oneida*,

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[7] Sherrill asserts that the Second Circuit conditioned reservation disestablishment on the presence of cession language. (Pet. 21). The Second Circuit actually stated that explicit cession language may be relevant but is not required. (Pet. App. A31).

434 F. Supp. at 539 (Treaty of Buffalo Creek did not ratify earlier illegal sales); *cf. Solem v. Bartlett*, 465 U.S at 472-75 (statute directing the Secretary of the Interior "to sell and dispose of" tribal land not explicit enough to eliminate reservation status).

Finally, disestablishment of the Oneida reservation in New York is not reflected in *New York Indians II*, which held the United States liable for the value of the Kansas lands promised to the New York Indians. The Second Circuit correctly explained that, in *New York Indians II*, the Court imposed liability because the New York Indians ceded *Wisconsin* lands to the United States in exchange for Kansas lands. That deal could not be undone; the ceded Wisconsin lands and the Kansas lands had been sold to private parties. The Court noted that the United States retained the proceeds from sale of that land, in Wisconsin and Kansas, and thus held the United States liable to pay the New York Indians the value of what had been promised to them in Kansas. The decision does not suggest that the damage award alienated New York lands. *See Oneida II*, 470 U.S. at 253 (no basis to hold that Oneidas' claims "have been satisfied").

### C. The Oneidas' Lands Never Lost Reservation Status Through A Cessation of Tribal Existence.

Review of Sherrill's final question presented should be denied because, contrary to Sherrill's suggestion, the Second Circuit's decision regarding continuous tribal existence does not conflict with *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987)(*Mashpee II*) (Breyer, J.), and because resolution of the question would not affect the judgment, the Second Circuit having concluded



that, "even if continuous tribal existence were required, the record before us shows it." (Pet. App. A44).[8]

The Second Circuit cited with approval both of the First Circuit's rulings concerning the land claim of the Mashpee Tribe. (Pet. App. A43-44). *Mashpee II* involved tribes that never were federally recognized and that sought recognition on the basis of scattered documents that did not bind the federal government. 820 F.2d at 484. The issue was not continuity. It was whether the plaintiffs "1) were tribes at the time the land was alienated and 2) remain tribes at the time of suit." 820 F.2d at 482. There is no question that the Oneidas meet that test.

The Second Circuit was correct that, because "the trust relationship [defined by the Oneidas' treaties and the Nonintercourse Act] has not been terminated or abandoned," (Pet. App. A43), the Oneidas' land retains reservation status when in the Nation's possession. Sherrill cites no authority for its proposal (Pet. 24) that a federally-recognized tribe must demonstrate its continuous existence in order to assert a claim to its reservation land. "Once a tribe has been recognized, the removal of that recognition, like reservation disestablishment, is a question for other branches of government, not the courts." (Pet. App. A44) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865)).

The record shows that federal recognition of the New York Oneidas was not terminated. The federal government continued to honor its 1794 treaty obligation to deliver annuities to New York to the Oneidas throughout the period

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[8]Sherrill also asserts a conflict with *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51 (2d Cir. 1994). (Pet. 24). There is no conflict because the Second Circuit applied *Golden Hill*. (Pet. App. A43). Regardless, there is no Circuit split.

when Sherrill would say the Oneidas ceased to exist. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 538 (CA JA 1506-18). The annuities are an uninterrupted recognition of the Oneidas as a party to treaties that protect the Oneida reservation, which is confirmed by the record in the test case litigation. See CA JA 1520 (BIA affidavit stating that federal government recognizes Oneida Indian Nation of New York as "one of the Indian tribes which entered into and signed" three treaties with the United States protecting Oneida land and "as the Indian tribe which remained on the New York Oneida Reservation").

Congress has delegated authority to the Secretary of the Interior to acknowledge tribes and to publish lists of acknowledged tribes. The Nation was on the first list in 1979, 44 Fed. Reg. 7325, 7326 (Jan. 31, 1979), and is on the current list, 68 Fed. Reg. 68180 (Dec. 5, 2003). "The Department's position is, and has always been, that the essential requirement for acknowledgment is continuity of tribal existence rather than previous acknowledgment." 59 Fed. Reg. 9280 (Feb. 25, 1994). Department of Interior acknowledgement "establishes tribal status *for all purposes*." H.R. Rep., 103-781 at 2, reprinted in 1994 U.S.C.C.A.N. 3678, 3679 (emphasis added).

In relying on excerpts from reports of Indian agents, Sherrill is arguing for an unprecedented kind of de facto termination. It is, however, up to Congress alone to terminate a reservation once established. *Solem v. Bartlett*, 465 U.S. at 471; *United States v. Celestine*, 215 U.S. 278, 285 (1909). There has been no termination of the Oneida reservation or of the Nation. *See e.g.*, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986) (statutory termination of Catawba tribe). In *United States v. John*, 437 U.S. at 653, this Court concluded that federal protection of the Mississippi Choctaws survived removal of most of the tribe to Oklahoma and a lapse in federal supervision. As here, Congress did not strip



the Mississippi Choctaws of federal protection. *Cass County v. Leech Lake Band*, 524 U.S. 103 (1998), which Sherrill cites for the rule that Indian land is taxable once federal protection is removed, (Pet. 25), only underscores the importance of congressional action. In *Cass County*, Congress made reservation land taxable by an allotment statute.

As to the Oneidas in particular, Sherrill's contention that the Oneida reservation was stripped of Nonintercourse Act protection by a lapse in tribal existence is also inconsistent with the result in *Oneida II*. This Court referred to the Nation as a "direct descendant" of the Oneida Nation that entered into treaties with the United States. 470 U.S. at 230. The Court's decision followed lower court litigation in which the Oneidas satisfied the *Mashpee* standards that Sherrill invokes here. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 537-38.

Sherrill assembles quotations referring to tribal abandonment, (Pet. 25-27), but carefully avoids claiming that it has evidence of abandonment by the New York Oneidas. Abandonment means that "[t]he Indians had to 'intend[ ] to give up their tribal organization' and abandon their tribal rights and status voluntarily." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (*Mashpee I*). The Annual Reports of the Commissioner of Indian Affairs throughout this period show that the Oneidas did not abandon the reservation as a tribe. They continued to occupy a 350-acre "Oneida reserve" in substantial numbers. (CA JA 1391-1514). Each Annual Report contains a name-by-name census, or roll, of the 150 or so Oneida members living on the Oneida reservation. (*Id.*). The 1890 Annual Report referred to "the Oneida Reserve, recognized by the treaty of 1794 with the Six Nations (7 Stat., p. 45), consist[ing] of detached farms held in severalty by heads of families and contain[ing] in all about 350 acres." (CA JA 1226); *see also* (CA JA 1229). Even the decision in *United States v. Elm*, 25 F. Cas. 1006, 1008

(N.D.N.Y. 1877), acknowledges that the Oneidas continued to appoint chiefs to receive federal annuities.

No court today can improve on the assessment of Oneida tribal existence made in *Boylan*, which was decided by a federal judge in New York based on a record that included testimony from witnesses, among them the Oneidas' chief. Indeed, in 1907, the State of New York, in its filing in the *Boylan* proceedings, reported that the Attorney General "was unable to discover that there is anyone who disputes" that the Oneidas had continued to possess the 32 acre tract as a band of tribal Indians led by chiefs (and were never subject to state taxes). (Resp. App. 15a-16a). The United States also formally alleged that the Oneidas remained wards and dependents of the federal government and were entitled to invoke the protection of federal laws and treaties against the state eviction order. The court found that the Oneidas remained a tribe, continuously occupying a part of their reservation. *United States v. Boylan*, 256 F. 468, 477-78, 481, 486 (N.D.N.Y. 1919) (evidence "shows conclusively they have not abandoned their tribal relations").[9] The Second Circuit affirmed that finding. 265 F.165, 171, 174 (2d Cir. 1920). The memories of the *Boylan* witnesses, the findings of the court who saw them and the conclusions of New York's

[9]If a cessation of tribal existence eliminated the Oneidas' rights, that would have to be true as to the entire reservation. Sensibly, Sherrill does not argue that the *Boylan* land is not federally protected reservation land immune from taxation. *See Waterman v. Mayor, City of Oneida*, 280 N.Y.S. 2d 927 (N.Y. Sup. 1967) (holding *Boylan* land is not taxable).



Attorney General cannot be undermined by the largely unexplained views of the observers cited by Sherrill.[10]

## CONCLUSION

For the foregoing reasons, Sherrill's petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 20, 2004

[10]To avoid the significance of *Boylan*, Sherrill refers to three scattered post-*Boylan* statements about the disappearance of the Oneidas and their reservation. Those statements are not a basis to deny the Oneidas' tribal existence. The statements are directly inconsistent with the formal position of the United States and the decision of the court in *Boylan* when there was an actual controversy to be decided. Moreover, the statements are conclusory and reflect nothing more than that the Oneidas had lost possession of almost all of their reservation. As to Cohen's Handbook of Federal Indian Law 416-17 (1942 ed.), it merely quotes from a 1915 memorandum, written before *Boylan*, and describes it generally as an "interesting account of the tribes inhabiting Western New York." Cohen did not say that the memorandum was accurate with respect to the Oneidas. Handbook, 417 n.6. This Court was not swayed by Mississippi's reliance on a similar statement in the Handbook regarding the Mississippi Choctaws. *United States v. John*, 437 U.S. at 651 n.20.

# APPENDIX

# OPINION, ATTORNEY GENERAL WM. BRADFORD'S WITH LETTER OF TRANSMITTAL TO SECRETARY OF WAR

The Attorney General has the honour of Stating his opinion upon the question propounded to him by the Sec$^{y}$ of War, Viz, whether the State of New York has a right to purchase from the Six Nations or any of them the lands claimed by those nations and situate within the acknowledged boundaries of that state, without the intervention of the general government.

By the Constitution of the United States, Congress has power to regulate commerce with the Indian Tribes, and by the act of 1 March 1793, it is expressly enacted, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in Law or equity, unless the Same be made by a treaty or convention entered into pursuant to the Constitution, that it shall be a misdemeanor in any person not employed under the authority of the United States in negotiating such Treaty or convention directly or indirectly to treat with any such Indians, nation or

tribe of Indians, for the title or purchase of any lands by them held or claimed &c.

The language of this act is too express to admit of any doubt upon the question unless there be something in the circumstances of the case under consideration to take it out of the general prohibition of the law.

Nothing of this kind appears on the documents submitted to the attorney General. It is true, that by treaties made by the State of New York with the Oneidas, Onondagas and Cayugas, previous to the present Constitution of the United States, those nations ceded all their lands to the people of New York, but reserved to themselves and their posterity forever (for their own use & cultivation, but not to be sold, leased or in any other manner disposed of to others,) certain tracts of their said lands, with the free right of hunting & fishing &c. So far therefore as respects the lands thus reserved the treaties do not operate further than to secure to the State of New York the right of preemption: but subject to this right they are still the lands of those nations, and their



claims to them, it is conceived cannot be extinguished bu[t] by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress.

June 16 – 1795

June 16 – 1795

Sir/

I do myself the honor to transmit to you my opinion on the question state[d] in your letter of the 13 instant and am

with great respect & esteem

Your most ob[t] Sv[t]
Signd/
Wm. Bradford

The Sec[y] of War

This is a true and complete copy of a document found in the Henry O'Reilly Papers. Mss Collection. New York Historical Society. New York City. Vol. 11.



26th Congress [Confidential B.] 1st *Session*

**MESSAGE**

**FROM**

**THE PRESIDENT OF THE UNITED STATES,**

**TRANSMITTING**

***The amended treaty with the New York Indians, and certain documents relating thereto.***

---

**JANUARY 14, 1840.**
**Read, and with the treaty and documents referred to the Committee on Indian Affairs.**
**JANUARY 15, 1840.**
***Ordered,* That the message, treaty, and accompanying documents, be printed, in confidence, for the use of the Senate.**

---

* * *

**[29]**

* * *

**No. 3.**

**WASHINGTON, *October 25*, 1838.**

SIR: In pursuance of the instructions from your bureau to me, under date of July 9, 1838, I have submitted to the several tribes of New York Indians the treaty concluded at Buffalo creek on the 15th day of January last, together with the amendments proposed by the Senate of the United States, in its resolution of ratification of the 11th of June last. I now hand you a copy of the amended treaty, with the assent of the several tribes in writing. At the time of making the submission, I fully and fairly explained the treaty and amendments to each tribe assembled in public council, according to the letter and spirit of the resolution of the Senate. I have now the honor to report to you the result of my labors with each of the several tribes.

*Oneidas in New York.*

On the 9th day of August last, I met this tribe in full council on their reservation in the State of New York, and communicated to them the talk ad-



[30]

dressed to the New York Indians from your office, and made such explanations as were necessary to enable them fully to understand every thing relative to the matter under consideration. Learning from them, before going into council, that under the laws of New York they had a resident attorney near them, I invited him to attend and hear my explanations, and to be a witness to all my proceedings. He complied with my request, and expressed his entire concurrence in all that I did. Some of the tribe expressed their fears that they might be compelled to remove, even without selling their land to the State, and desired some evidence from me that such would not be the construction of the papers. On consulting with Timothy Jenkins, Esquire, their local State agent, I drew up and gave them an assurance to that effect, a copy of which I hand you, marked No. 1. On receiving this, a large number signed the written assent, which is attached to the manuscript

copy of the treaty. The assent is far more numerously signed than the treaty itself was, and embraces the names of prominent men of each of the parties into which this tribe is subdivided. In my judgment it is sufficiently signed, and ought to receive your approbation. By the treaty, the sum of four thousand dollars is to be paid to Baptiste Powlis, and the chiefs of the first Christian party, residing at Oneida, and the sum of two thousand dollars to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof. I was authorized by my instructions, that if "the Oneidas, who signed the treaty at Buffalo, should give their assent to it as amended, to apportion the sums of $4,000 and $6,000 [$2,000] therein stipulated to be paid to them respectively, upon which apportionment the payment will hereafter be made." After the assent was fully signed, the chiefs of the parties, to whom this money is to be paid, proposed an apportionment, to which I gave my consent,



no one objecting. A duplicate of this apportionment I hand you, marked No. 2.

* * *

To the Chiefs, Head men & warriors of the Oneida Indians in New York.

In order to prevent all mistakes & to counteract all misrepresentations concerning the purpose of the treaty concluded between the United States and the New York Indians at Buffalo Creek on the 15th day of January 1838, & which was ratified by the Senate of the United States with amendments which have been this day assented to by the Oneidas at Oneida Castle, I hereby most solemnly assure them that the treaty was not, & is not intended to compel the Oneidas to remove from their reservations in the state of New York to the west of the state of Missouri or elsewhere unless they shall hereafter voluntarily sell their land where they reside & agree to do so. They can, if they choose to do so remain where they are forever. The treaty gives them lands if they go to them and settle there, but they need not go unless they wish to. When they wish to remove, they can sell their lands to the Governor of the State of New York, & then imigrate. But they will not be compelled to sell or remove.



Dated at Oneida Castle
August 9th 1838

R. H. Gillet
Commissioner
LC

National Archives
Special Case 29
New York 1838-G 390 No. 1

INFORMATION

IN RE

ONEIDA INDIANS,

LAID BY THE ATTORNEY-GENERAL BEFORE THE SUPREME COURT.

AT THE BROOME SPECIAL TERM, NOVEMBER, 1907.

---

May it Please the Court: --

The Governor, on October 15th, ult., was waited upon by a delegation of Oneida Indians, who represented that they expected to be dispossessed of a parcel of land, containing about thirty-two acres, situate in the former town of Lenox, Madison County, in consequence of an action pending in this Court, entitled Julia Boylanvs. Mary George, et al.

These Indians declared that such act would constitute a violation of their tribal rights and threw themselves upon the protection of the State. The Governor entertained the complaint and referred it to the Attorney-General for investigation.



The report of the Attorney-General set forth the following matters: --

By treaty made between the State and the Oneida Indians at Fort Schuyler, in 1788, whereby the State obtained its first and largest cession of lands from the Oneida Indians, it was provided that the People of the State might prevent any persons, except Indians, from residing or settling on the lands reserved to the Oneidas and their posterity by the treaty and that if any person should, without the consent of the State come to reside or settle on such reservation, then the Oneidas and their posterity should forthwith give notice of such intrusion to the Governor, and further that the Oneidas and their posterity forever should, at the request of the Governor aid the State in removing all such intruders.

[2]

The thirty-two acres in question is part of the lands reserved by that treaty.

By treaty made on June 19, 1840, between the State and the Oneidas then remaining within the State, and from

whom these complaining Indians descended, and by which the reservation was reduced by cession to the State, but left so as to include the land in question here, it was provided (Article 6) that the lands thus reserved should not be liable to any sale or transfer, absolute or conditional, or be subject to any lease or mortgage, to any person or body, other than the People of the State of New York.

By further treaty, entered into on May 23, 1842, between the remaining Oneidas, made up of the First and Second Christian Parties, then residing in the town of Lenox, and the State of New York, certain lots of the Reservation were ceded to the State.

At the same time and by the same instrument, a party of those Oneidas then intending to emigrate, released to the Home Party, and to its successors, all right, title and interest in the lots to be retained, the treaty declaring that "all lots so reserved shall be deemed the common property of all the Indians who remain, and who are enumerated in Schedule B., annexed to the Treaty."



The thirty-two acres in question is part of Lot No. 17, as so surveyed and reserved. That lot was allotted to a group or band of twenty-three Indians, from whom the complaining Indians in this case are descended.

The thirty-two acres in question is now in the quiet and undisputed possession of some twenty or upwards of Oneida Indians, who now have their home thereon. Their ancestors likewise possessed it in peace for an unknown time past. The present generation constitute, in fact, a band, with chiefs or

[3]

head men, who speak for them, and claim tribal rights.

The State, on February 25, 1846, concluded a further treaty with the remaining Oneida Indians in the States, recognizing them as a band witha tribal government.

Later still, in the year 1870, the Legislature, by Chap. 445 of the Laws of that year, authorized the Commissioners of the Land Office to treat with the Oneida Indians.

No tax has ever been laid on this thirty-two acres of land under any State authority. No record has been found of any authority for an entry to be made upon this land, in hostility to the Indian possession. The Attorney-General has been unable to discover that there is anyone who disputes the matters above referred to, by way of facts. Information thereof is now laid before this Court, with the approval of the Governor.

With the permission of the court, its attention is respectfully invited to pertinent general considerations.

This Court, in common with other departments of State government, must determine for itself what its duty may be in respect to matters claimed to be the subject of engagement between the State and Indian tribes whose independent rights have been recognized. The same is true when matters affecting Indian tribes are involved and their rights have been made the subject of the State's guardianship, by reason of the helpless dependence of the Indians upon the State. In reaching its conclusion as to that duty, this Court



would exercise judicial wisdom, but the Court would not thereby exercise a judicial function. The determination by this Court of its own duty, if it leads to action prejudicial to Indian rights, does not conclude the Indians thereby. If the State breaks its engagements by reason of the action of its own courts, the State could not defend or disprove the breach by setting up the judgment of its own courts in justification.

[4]

When two Peoples, politically independent, enter into mutual engagements, the peaceable and just settlement of contentions relating to the subject-matter are left of necessity to adjustment by joint action of the parties. There is no tribunal with jurisdiction common to the State and any Indian tribe with which the State has treated.

The history of this piece of land subsequent to the treaties may be disputed here. This Court, however, is not bound to ascertain that history with certainty, for the facts may not properly be treated as issuable matter, subject to determination in a private action. State departments, officers,

citizens and inhabitants must take notice of the public acts of the State. If those acts are ignored, and in consequence, Indian rights are violated, the State will be holden to the tribe for redress of the injury, even though there is no tribunal to enforce the obligation. If the State has, by permissive statutes, consented that its citizens might deal directly with Indian tribes, such transactions, as to the citizens concerned therein, are private, nevertheless, and are not entitled to receive judicial notice. When a tribe in possession denies that it ever consented that citizens of the State should acquire interests claimed by citizens in tribal lands, the issue must be left for settlement to the State and the tribe.

To avoid being instrumental in violating obligations of the State treaties, the de facto possession of Indian lands by an Indian band should justify, if it does not create a duty on the part of the State officers and departments, to refrain from aiding citizens in acts hostile to the tribal possession. The State Indians, by various treaties, have yielded their rights to sell their lands without the consent



[5]

of the State, but that fact does not validate a sale made with State consent, but without tribal consent.

In addition to the right thus yielded by the Indians to the State, the terms of all early legislation relating to Indians evidences the assumption by the State of the protection of Indian rights.

The relation of de facto guarandianship has thus arisen, and the Indians have accepted that relationship. That relationship forbids either private or official action detrimental to Indian rights. To whom shall the ward turn, with no court to protect it, if the guardian shall wrong the ward? There are too few Indians left to dig up their buried tomahawks. The State has encouraged and aided the process of disbandment and dispersion of the Indians. The helplessness of the remaining bands makes more pronounced the duty of protecting them. Whatever the duty of State officers might be, if the State, acting in its sovereignty, by legislation approved by the Governor, should direct a hostile

dispossession of Indians from reservation lands, the matter of that duty is not involved here.

There is a special reason why Indian tribal rights should not be violated under color of official action. That arises out of an implied limitation on the powers of any public department or officer, springing from the provisions of the State Constitution, which still prohibits, as it always has, traffic in Indian reservation lands, by any person subject to State jurisdiction, where the Legislature has not expressly consented thereto. (Constitution, Article I, sec. 15).

The statute (Indian Law, section 2) declaring that Indians may hold and convey real estate the same as citizens, no doubt authorizes citizens to traffic in Indian lands, but in the case of Indian real estate, the consent would apply only when the tribe has consented to sell, as a tribe, or to permit its

[6]

members to sell as individuals. If there is a dispute as to whether the tribe or band ever gave such consent, the State's first duty is on the side of its Indian wards, as against its own



citizens, because of the State's self-imposed trust over Indian interests. That trust has never yet been terminated by any sovereign act of the State, brought home to the notice of the Indians. No citizen is justified in invoking the courts to serve his individual interests where, as a citizen, he is at the same time estopped by an inconsistent existing public interest. If the Courts aid citizens in trafficking in Indian lands, the courts would be offending an implied and controlling limitation, imposed by the Constitution upon their power. The onus of defending the rights of Indians cannot rest on Indians. To require of them, at the peril of losing their lands, that they appear in our courts or do any other acts involving expense or trouble to them, or which assumes them competent to protect themselves, would be to deny the protection of the guardianship which the State has undertaken.

Not only is the State in its sovereignty, the de facto guardian of Indian rights, but every public officer, sworn to uphold the Constitution, is bound to such action as is consistent with the duty owing by the Sate to these Indians.

No special procedure to insure unity of action between the various State departments, so as to compass the fulfillment of State obligations, has been provided. The only special instance covered by statute is a case where Indian possession of reservation lands has been actually invaded. In that case, the Commissioners of the Land Office must take notice of it, and they are charged with the duty of action. (Public Lands Law. sec. 7). In such a case, the court is required to lend its aid to protect the Indian possession by punishing the trespasser, and the trespasser, if a white citizen, may not

[7]

plead title in himself and have the issue tried out. (People vs. Dibble, 16 N.Y., 203). That case declares that, when Indian tribal lands have never come into possession of Whites, the making of an original entry is an act of sovereignty which an individual citizen is not competent to perform. If as Judge Brown said there, the moment an actual intrusion by Whites is made out there is nothing more to be tried, nothing for the



courts to determine in respect to the right of occupancy and possession by the Indians, then the moment it appears that a judicial proceeding is brought to effect an intrusion, there is no question as to the legality of the existing Indian possession which may be tried therein.

So long as the State, by making treaties and by failure to tax Indian lands in possession of Indians, recognizes a tribal organization as existing, the courts and officers of the State should do the same. (Cayuga Nation vs. State, 99 N.Y., 236).

In the present matter, the view which one State department may take is not of itself controlling over any other. Each will determine upon the propriety of its own action according to its own light. But the presence in the Treaty of 1839 of the provisions that the Oneidas, having a complaint to make, shall address the Governor, lays upon the Executive the duty of giving information of the complaint, if he deems it proper, by proclamation or other appropriate means, according to the exigencies of the particular case.

Respectfully submitted,

WILLIAM S. JACKSON,

Attorney-General.

George P. Decker,
Deputy Attorney-General

November 16th, 1907



**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| THE ONEIDA INDIAN NATION OF NEW YORK STATE, THE ONEIDA INDIAN NATION OF WISCONSIN, and THE ONEIDA OF THE THAMES, | ) | CIVIL ACTION No. 74-CV-187 |
| Plaintiffs, | ) | (LEK/DRH) |
| and | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff-Intervenor, | ) | |
| v. | ) | |
| THE STATE OF NEW YORK, COUNTY OF MADISON, NEW YORK, and COUNTY OF ONEIDA, NEW YORK, | ) | (Federal Common Law Claims; Nonintercourse Act Claims) |
| Defendants. | ) | |

**UNITED STATES' REPLY TO THE STATE OF NEW YORK'S COUNTERCLAIMS**

* * *

[9]

* * *

55. The United States denies the allegations of paragraph 55. Disestablishment is not an issue in this case. To the extent that the issue of disestablishment is relevant to the present controversy, the United States takes the position that the reservation has not been disestablished.

* * *

**DEFENSES**

* * *

[10]

* * *

7. No federal statute or treaty disestablished or diminished the boundaries of the Oneida Reservation as acknowledged by the 1794 Treaty of Canandaigua and by other federal treaties.

* * *



**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| THE ONEIDA INDIAN NATION OF NEW YORK STATE, THE ONEIDA INDIAN NATION OF WISCONSIN, and THE ONEIDA OF THE THAMES, | ) | CIVIL ACTION No. 74-CV-187 (LEK/DRH) |
| Plaintiffs, | ) | |
| and | ) | |
| UNITED STATES OF AMERICA and NEW YORK BROTHERTOWN INDIAN NATION | ) | |
| Plaintiffs-Intervenors, | ) | |
| v. | ) | |
| THE STATE OF NEW YORK, COUNTY OF MADISON, NEW YORK, and COUNTY OF ONEIDA, NEW YORK, | ) | (Federal Common Law Claims; Nonintercourse Act Claims) |
| Defendants. | ) | |

**RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' FIRST SET OF INTERROGATORIES**

* * *

**[15]**

* * *

**INTERROGATORY NO. 12**

Do you contend that any "conditions, precedent and subsequent" (as alleged in Affirmative Defense 4 of the Plaintiff Tribes' Reply) contained in the 1838 Treaty of Buffalo Creek failed? If so, state the basis for your contention and identify all documents that support your contention.

**Response:**

Without waiving any general or specific objections, and subject to continuing investigation, the United States responds as follows: Yes. In Article 2 of the Treaty of Buffalo Creek, the United States agreed "to set apart [a] tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians." The tract reserved for the New York Indians was sold, making removal under the terms of the Treaty impossible. See New York Indians v. United States, 170 U.S. 1, 24 (1898) ("The lands west of the Mississippi (the Kansas lands) were, after the treaty of Buffalo Creek, surveyed and made a part of the public domain, and sold or otherwise disposed of by the



United States. . . ."). See also Sen. R. 910, 52d Congress, 1st Session, July 12, 1892 (same). In addition, under the Treaty, it was the United States' responsibility to remove the Indians. See Fellows v. Blacksmith, 60 U.S. 366 (1856). The United States never undertook that responsibility, even though with regard to other removal treaties, the United States had been willing to use force, if necessary, to carry out treaty terms. Oneida 51 2218. Article 13 of the treaty conditions Oneida removal to lands reserved them under the Treaty upon "satisfactory arrangements with the Governor of the State of New York for

[16]

the purchase of their lands at Oneida." In the absence of satisfactory arrangements, there Oneidas were not required to move. Such arrangements had to comply with federal law, including the Nonintercourse Act. The Oneidas never made arrangements to sell land to New York in order enable removal to Kansas. In addition, removal was understood by all parties to be conditioned upon a voluntary willingness on

the part of the New York Indians to be removed. The United States was unwilling to appropriate funds to facilitate removal in light of apparent unwillingness of any significant group of New York Indians to remove. See Oneida 51 2216-31 (1846 Report of United States Commissioner of Indian Affairs); Oneida 51 2238-43 (1844 Report of United States Commissioner of Indian Affairs). The Oneidas were assured by a representative of the United States that the Treaty did not require their removal and that "[t]hey can if they choose to do so remain where they are forever." Ransom Gillet to Chiefs, Headmen, and Warriors of the Oneida Indians in New York, August 9, 1838.

**INTERROGATORY NO. 13**

With respect to the denial contained in paragraphs 19 and 30 of the U.S. Reply, describe in detail each and every action the United States has taken to reserve, acknowledge, or recognize rights of the Nation or Plaintiff Tribes in the Subject Land, and identify all documents that support your contention.

The United States objects to Interrogatory No. 13 on the grounds that it seeks information that is part of the public



record or is otherwise as available to the State as it is to the United States. A proper and complete response to Interrogatory No. 13 requires a detailed review of the historical record, and defendants are as capable of undertaking such work as the United States. Further, Interrogatory No. 13 is irrelevant to the question of liability.

Without waiving any general or specific objections, and subject to continuing

[17]

investigation, the United States responds as follows: The United States reserved the subject land to the Oneida Nation through the Treaty of Canandaigua. The United States participated as an amicus supporting the Oneida plaintiffs in County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). The United States acted to secure the Oneidas in their rights to their land in United States v. Boylan, 256 F. 468 (N.D.N.Y. 1919).

**INTERROGATORY NO. 14**

Set forth in detail the basis for the United States' denial in paragraph 42 of the U.S. Reply of the allegation that under the 1788 Treaty of Fort Schuyler the Nation "did cede and grant all their lands to the State forever," and identify all documents that support your contention.

**Response:**

The United States objects to this interrogatory on the grounds that it seeks information regarding a legal conclusion.

Without waiving any general or specific objections, and subject to continuing investigation, the United States responds as follows: The Treaty of Fort Schuyler is the best evidence as to its legal meaning. The Second Article of the Treaty reserves lands in the State of New York to the Oneidas. See also County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 231 (1985) (noting that under the "'treaty'" of Fort Schuyler, the State "purchased the vast majority of the Oneidas' land," but that the "Oneidas retained a reservation of about 300,000 acres").



**INTERROGATORY NO. 15**

Do you contend that the Nation retained aboriginal title to any lands that are referred to in the 1788 Treaty of Fort Schuyler? If so, identify such lands, state the basis for your contention and identify all documents that support your contention.

**Response:**

[18]

The United States objects to this interrogatory on the grounds that it seeks information regarding a legal conclusion. In addition, this interrogatory does not concern matters relevant to this litigation since the Court has stricken all defendants defenses relating to the claim that the Oneida Nation ceded all their aboriginal land in the Treaty of Fort Schuyer. See Oneida Indian Nation v. New York, 194 F. Supp.2d 104, 140 (N.D.N.Y. 2002) ("[T]he Court finds that the Treaty of Fort Schuyler cannot reasonably be understood to have divested the Oneidas of their aboriginal title in the subject lands.").

**INTERROGATORY NO. 16**

As to the denial in paragraph 49 of the U.S. Reply, state the manner in which you contend that the State's interest

in the land set aside for the use of the Nation under the 1788 Treaty of Fort Schuyler was "decrease[d] or otherwise affect[ed] by the 1794 Treaty of Canandaigua" and identify the precise language in the 1794 Treaty of Canandaigua that did so.

**Response:**

The United States objects that this interrogatory is irrelevant because the court has dismissed the State's takings counterclaim, finding that the State has no compensable interest that was lost under the Treaty of Canadaigua. See Oneida Indian Nation of New York v. New York, 194 F. Supp.2d 104, 146-47 (N.D.N.Y. 2002). The United States also objects that this interrogatory is confusing and ambiguous given that paragraph 49 of the United States Reply does not concern either the Treaty of Fort Schuyler or the Treaty of Canandaigua. Without waiving any general or specific objections, and subject to continuing investigation, the United States responds as follows: In paragraph 45 of the Second Amended Complaint, the United States denied the State's contention that, in the Treaty of Canandaigua, the



United States merely acknowledged the lands reserved to "the Oneidas in its treaties with the State but did not

[19]

decrease or otherwise affect the rights or interest of the State in these lands and had no power or authority to do so under the constitution or laws of the United States." New York State Answer, Counterclaim V, ¶ 45. When the State ratified the Constitution, it recognized the United States' exclusive authority over Indian land; while the State retained the right of preemption, Article II of the Treaty of Canandaigua made explicit that Oneida possessory rights to the land could only be extinguished through a sale of land transacted under the authority of the United States. The precise language is the single sentence comprising Article II of the Treaty of Canandaigua.

**INTERROGATORY NO. 17**

Did the United States compensate the State of New York in any way for decreasing or otherwise affecting the State's interest in the land set aside for the use of the Nation under the 1788 Treaty of Fort Schuyler? If so, state in detail the

basis for your contention and identify all documents that support your contention.

**Response:**

The United States objects to Interrogatory No. 17 on the following grounds: it seeks information that is neither relevant to the subject matter of this litigation nor reasonably calculated to lead to the discovery of admissible evidence. The Court has dismissed the State's takings counterclaim, noting that "an assertion of federal control over Indian land by the United States," as occurred with the Treaty of Canandaigua," does not constitute a taking pursuant to the Fifth Amendment for which the State should be compensated." Oneida Indian Nation v. New York, 194 F. Supp.2d 104, 147 (N.D.N.Y. 2002).

**INTERROGATORY NO. 18**

With respect to the denials contained in paragraphs 48 and 49 of the U.S. Reply, do you contend that the 1838 Treaty of Buffalo Creek did not require the Oneida Indians then remaining in New York and Wisconsin to remove from those States? If so, state in detail the basis for your contention.





**Response:**

Without waiving any general or specific objections, and subject to continuing investigation, the United States responds as follows: Yes. The Treaty of Buffalo Creek made removal of the New York Indians to the lands reserved for them in Kansas dependent upon a number of conditions. See response to Interrogatory No. 12.

**INTERROGATORY NO. 19**

Do you contend that at any time since the 1838 Treaty of Buffalo Creek the United States has recognized any portion of the Oneida Reservation as an Indian reservation under the superintendence of the United States or a right of the Nation or any of the Plaintiff Tribes to exercise tribal sovereignty or jurisdiction over any parts of the Oneida Reservation? If so, identify which portion of the Oneida Reservation, describe in detail the basis for that contention and identify all documents that support such contention.

**Response:**

The United States objects to Interrogatory No. 19 insofar as providing a complete answer is unduly burdensome because it would require a review of the extensive historical record spanning over two hundred years. Further, since that record is as available to defendant to the United States, the

United States should not be required to do defendants work of reviewing documents and determining how they should be used in litigation.

Without waiving any general or specific objections, and subject to continuing investigation, the United States responds as follows: See response to Interrogatory No. 13.

**INTERROGATORY NO. 20**

Do you contend that the United States Senate, in voting on the 1838 Treaty of Buffalo Creek, intended to recognize an Oneida Indian reservation in New York after the Oneidas removed to Indian Territory as contemplated by that Treaty? If so, state in detail the basis for your contention and identify all documents that support such contention.

**Response:**

[21]

The United State objects that this interrogatory calls for speculation. Without waiving any general or specific objections, and subject to continuing investigation, the United States responds as follows: The United States contends that the Treaty of Buffalo Creek does not indicate what would happen to the Oneida Reservation in New York in the event



the Oneidas were willing and able to avail themselves of the opportunity offered by the Treaty to remove to lands in Kansas. The United States contends that what may have been intended had the Oneidas removed pursuant to the Treaty of Buffalo Creek is irrelevant to this litigation because the Oneidas did not remove from their land pursuant to the Treaty.

**INTERROGATORY NO. 21**

As to the denial in paragraph 46 of the U.S. Reply of the allegation that after the Agreements and Transfers the Oneidas removed from the State (except for a small remnant that moved to other Indian reservations in New York), state the basis of your denial and identify all documents relating thereto.

**Response:**

The United States objects to Interrogatory No. 21 on the following grounds: it seeks information that is neither relevant to the subject matter of this litigation nor reasonably calculated to lead to the discovery of admissible evidence relating to liability. The United States also objects that providing a complete answer is unduly burdensome because it

would require a review of the extensive historical record spanning over two hundred years to find all records relating to Oneida populations in New York and elsewhere. Further, since that record is as available to defendants as it is to the United States, the United States should not be required to do defendants' work of reviewing documents and determining how they should be used in litigation.

Without waiving any general or specific objections, and subject to continuing

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investigation, the United States responds as follows: The United States contends in its denial in paragraph 46 of the U.S. Reply that the Oneida Indians who remained in New York constituted more than a "remnant." While in 1862, the sub-agent assigned to the Office of the New York Agency wrote the United States Commissioner of Indian Affairs and characterized the Oneidas in New York as a "remnant" numbering about a hundred, Oneida 51 2266, subsequent counts noted that the New York Oneida population was



increasing. See Oneida 51 2229 (1846 report estimating Oneida population at 159); Oneida 51 2213 (1847 report noting Oneida population increasing, estimating their number at 210); OW000248 (indicating that a 1910 survey of Oneida enrollment showed 5,476 located in New York with 2,301 located in Wisconsin).

* * *

Supreme Court, U.S.
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(5)

No. 03-855

IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner*,

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF OF CITY OF SHERRILL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In its Petition, the City of Sherrill ("Sherrill") demonstrated that review of the Second Circuit's decision is required because the Second Circuit ignored decisions of this Court and controlling treaties and conflicted with decisions of other circuits. The Second Circuit incorrectly held that:

(1) the land upon which the disputed properties (the "Properties") are located is Indian Country, despite the fact that the land was neither set aside nor superintended by the federal government, contrary to *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*"), and the express language of the 1788 Treaty of Fort Schuyler;

(2) the 1838 Treaty of Buffalo Creek, 7 Stat. 550, did not disestablish the Oneida reservation in New York, despite the fact that the treaty required all Oneidas living in New York to abandon all lands in New York and move to Kansas, contrary to the express language of the treaty and this Court's decision in *New York Indians v. U.S.*, 170 U.S. 1, 19 (1898); and

(3) Respondent Oneida Indian Nation of New York ("OIN") continues to enjoys the protection of the Non-Intercourse Act, 25 U.S.C. §177, for its "ancestral homeland", as a matter of undisputed fact, despite evidence that OIN's tribal existence ceased for a period of several decades, contrary to logic and other circuit court decisions.

Rather than addressing the serious errors made by the Second Circuit and the consequences of those errors, OIN principally asserts that the Petition should be denied because this Court has already decided the precise issues raised by the Petition. That assertion is false, and further demonstrates why the Petition raises special and important reasons

warranting this Court's exercise of its discretion to issue a writ of certiorari to review and correct the serious errors made by the Court of Appeals.

## I. THIS COURT HAS NOT PREVIOUSLY DECIDED ANY OF THE ISSUES RAISED IN THE PETITION

OIN suggests that this Court in *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("*Oneida II*") decided the issues raised by the Petition and "established that the Constitution, federal statutes and federal treaties protected the Oneidas and their reservation and that the United States never terminated that protection." (OIN Br. at 11). That is incorrect.

As this Court is well aware, in *Oneida II*, this Court held that: (i) the Oneidas had a cause of action under federal common law (470 U.S. at 236); (ii) the defenses of statute of limitations, (*id.* at 244), laches (*id.* at 245), abatement (*id.* at 246) and ratification by federal Indian treaties in 1798 and 1802 (*id.* at 248) did not apply; and (iii) the suit did not raise a political question. (*Id.* at 250). This Court in *Oneida II* was not presented with and did not address the effect of the 1788 Treaty of Fort Schuyler or the 1838 Treaty of Buffalo Creek. Indeed, the Treaty of Fort Schuyler is not cited at all and the only place the 1838 Treaty of Buffalo Creek is mentioned in *Oneida II* is in the dissenting opinion, where Justice Stevens observed that "[t]here is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek, which ceded most of the Tribe's lands in Wisconsin to the United States in exchange for a new reservation in [Kansas]." 470 U.S. at 269 n.24.

To be sure, this Court in *Oneida II* noted in passing that, in 1788, the Oneidas entered into a treaty with the State of New York, pursuant to which the State purchased the vast



majority of the Oneida's land, with the Oneidas retaining a reservation of approximately 300,000 acres. (470 U.S. at 231; OIN Br. at 17). This Court, however, did not even name the treaty to which it was referring and did not address whether the reservation remaining (after the treaty) was created by the State of New York or the federal government. Thus, *Oneida II* does not discuss the federal set aside or federal superintendence consequences of the 1788 Treaty of Fort Schuyler – the requirements for establishing Indian country status under 18 U.S.C. §1151(a) pursuant to this Court's decision in *Venetie*. Indeed, *Venetie* was decided 13 years after *Oneida II*.

Finally, OIN ignores the state of the record in *Oneida II*: (1) the parties in *Oneida II* stipulated in the district court that the disputed land was within the boundaries of the Oneidas' 1788 reservation, *Oneida Indian Nation of New York State*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part and rev'd in part*, 470 U.S. 226 (1985); (2) the Counties submitted no evidence at trial, 434 F. Supp. at 532; and (3) on appeal, the Counties did not dispute the district court's finding that the 1795 conveyance at issue violated the Non-Intercourse Act, *Oneida II*, 470 U.S. at 233.

Thus, *Oneida II* did not decide any of the issues presented for review by the Petition.

## II. THE DECISION BELOW CONFLICTS WITH *VENETIE* AND THE EXPRESS LANGUAGE OF THE 1788 TREATY OF FORT SCHUYLER

In the Petition, Sherrill demonstrated that the decision below conflicts with *Venetie* and the express language of the 1788 Treaty of Fort Schuyler, by finding Indian Country status under 18 U.S.C. §1151, despite the fact that the Properties were not federally set aside, but rather set aside by

the State of New York, and despite the fact that the Properties are not and have never been federally superintended. (Petition at 17-19).

OIN hides from *Venetie* and the Treaty of Fort Schuyler. Rather, OIN asserts that the disputed land is Indian Country because it is a reservation. (OIN Br. at 13). That is circular reasoning. Land does not attain Indian Country status – whether it is reservation land, a dependant Indian Community or allotments – under *Venetie* unless the land has been federally set aside for the use of the Indians as such and federally superintended. 522 U.S. at 530.[1] Merely labeling land a "reservation" does not supply the required analysis or proof.

OIN ignores entirely the fact that, in the 1788 Treaty of Fort Schuyler, the New York Oneidas **expressly** ceded **all** of their territory to the State of New York, terminating all aboriginal title. New York then set aside a reservation of approximately 300,000 acres for the New York Oneidas' future use. The 1794 Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create or set aside a reservation for the Oneidas. (Petition at 15-17).[2] OIN's argument that the

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[1] OIN notes that *Venetie* involved an Indian tribe's claim that certain land was a "dependent Indian community" under § 1151(b) and did not address a claim of reservation status pursuant to § 1151(a). (OIN Br. at 13). This is a classic distinction without a difference. This Court made clear in *Venetie* that the determination of whether land is Indian Country is the same, whether such land is claimed to be a reservation, a dependent Indian community or an allotment. *Venetie*, 522 U.S. at 527.

[2] OIN's observation that Sherrill first cited the 1788 Treaty of Fort Schuyler "in a post-argument letter to the Second Circuit" (OIN Br. at 14) is a diversion. Sherrill, in both its principal (11-12) and reply (16 n.12) briefs in the Court of Appeals, pointed out that, in 1788, the Oneidas sold



protection afforded the Oneidas in the 1794 Treaty of Canandaigua "was not less than the protection given in the same treaty to the Senecas' land" (OIN Br. at 12-15) is contrary to the express language of the 1794 Treaty of Canandaigua. Article II of the Treaty of Canandaigua expressly acknowledged the land reserved by New York State for the Oneidas, while Article III expressly established the Seneca's reservation, explicitly setting forth its metes and bounds.[3]

OIN also totally ignores the requirement of federal superintendence for Indian Country status under *Venetie*. Instead, OIN claims that federal superintendence is established simply because federal set aside is established, *i.e.*, because of the provisions in the 1794 Treaty of Canandaigua. (OIN Br. at 19 n.6). *Venetie*, however, requires federal set aside and federal superintendence. Treaty provisions, at most, address the issue of federal set aside, not superintendence. Superintendence requires that the federal government "actively controls the lands in question, effectively acting as guardian for the Indians." *Venetie*, 522 U.S. at 533. No such superintendence over the Properties ever occurred.

Thus, the Petition must be granted to correct the evisceration of *Venetie* by the Second Circuit.

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all of their land to the State of New York and received back 300,000 acres from the State.

[3] OIN claims that "a Congressional resolution and . . . three federal treaties" "acknowledged" an Oneida reservation. (OIN Br. at 13-14). Those actions refer to the acknowledgment of the existing State-created reservation in the 1794 Treaty of Canandaigua, and other references to that Act. That acknowledgment did not create a federal reservation; it merely acknowledged a State reservation.

## III. THE 1838 TREATY OF BUFFALO CREEK REQUIRED THE ONEIDAS TO ABANDON ALL LANDS IN NEW YORK

In *New York Indians v. U.S.*, 170 U.S. 1 (1898), this Court held that, upon execution of the 1838 Treaty of Buffalo Creek, the Oneidas were required to abandon all eastern lands (including lands in New York) and move to Kansas (west of the Mississippi River). As a result, the New York Oneidas shared in a nearly $2 million recovery flowing from the sale of the Kansas land by the United States to non-Indian settlers. *See id.* at 19; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. U.S.*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases"). Thus, the New York Oneidas sought and received the benefit of the 1838 Treaty of Buffalo Creek, albeit not the benefit for which they initially bargained. OIN's opposition brief and the decision below distort these dispositive facts.

OIN argues that the 1838 Treaty of Buffalo Creek was limited to Wisconsin lands, and had nothing to do with lands in New York. (OIN Br. at 22). That ignores the language of the Treaty and the *New York Indians* cases. The language of the Treaty required all New York Oneidas living east of the Mississippi River to remove to Kansas. Treaty, Arts. 1, 2, 13. Moreover, this Court has explained that the agreement by the New York Oneidas and others to abandon all eastern lands, rather than the exchange of Wisconsin and Kansas lands, was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Further, the judgment was not limited to lands in Wisconsin; the New York, Wisconsin and Thames Oneidas all shared in a nearly $2 million recovery. *See id.* at 19; *United States v. New York Indians*, 173 U.S. at 468-69; *New York Indians v. U.S.*, 40 Ct. Cl. at 457-61; *In re Appeal of New York Indians*, 41 Ct. Cl. at 468-72.



OIN muses that the "[*New York Indians* cases] [do] not suggest that the damage award alienated New York lands," citing *Oneida II* (OIN Br. at 22); and that Sherrill is, in effect, asking that the Treaty of Buffalo Creek be construed "as ratifying all pre-1838 sales of Oneida land." (OIN Br. at 21). Those assertions are disingenuous. The majority opinion in *Oneida II* did not even mention the 1838 Treaty of Buffalo Creek. What is more, Sherrill is not arguing that *New York Indians* alienated New York lands or that the Treaty of Buffalo Creek ratified prior sales of New York lands. Rather, the Treaty of Buffalo Creek required the New York Oneidas to abandon all lands in New York. That federal requirement of abandonment ended any reservation in New York.

OIN suggests that Commissioner Gillett's comments would have led the Oneidas to believe that removal was not mandatory. (OIN Br. at 20, citing *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 196 (1999)). First, that argument is inconsistent with *New York Indians*, which found that the Oneidas had a vested right to the Kansas lands at the time the treaty was enacted. Further, as *amicus curiae* State of New York points out in its brief in support of the Petition, reliance on Commissioner Gillett's statements is "at odds" with the *New York Indians* cases, because there is no evidence that those statements ever received Presidential or Congressional approval. (New York State Amicus Br. at 8).

The Second Circuit interprets the Treaty of Buffalo Creek as leaving the Oneidas with a 300,000-acre New York reservation and a 1,824,000-acre reservation in Kansas. That stands history, logic and the *New York Indians* decisions on their heads. This Court should grant the Petition to correct that error and its serious consequences in the State of New York.

## IV. INDIAN COUNTRY STATUS ENDS WHEN A TRIBE CEASES TO EXIST

The Second Circuit also erred in affirming summary judgment that the Properties were Indian Country in the face of serious factual disputes – established without any discovery – as to whether that the Oneidas maintained a continuous tribal existence from the time the reservation was allegedly established to when the Properties were repurchased. That is yet another compelling reason why the Petition should be granted.

In response, OIN argues that this Court in *Oneida II* found that the OIN was among the "direct descendents of the Oneida Indian Nation, one of the six nations of the Iroquois" (470 U.S. at 231) and that OIN is currently a federally recognized tribe. Those "facts" establish only that the OIN currently exists; they do not address the dispositive issue: whether the Oneidas have maintained a continuous tribal existence between from the late 1700s to the date it bought the Properties.

OIN maintains – and the Second Circuit agreed – that a federally recognized tribe need not have maintained continuous tribal existence in order to sustain a claim to reservation land. (OIN Br. at 23). This is not the law. Rather, OIN has no claim to continuing historical reservation status for the Properties, unless OIN has been in continuous tribal existence since the Properties became subject to the Non-Intercourse Act. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*") ("To establish a *prima facie* case based on a violation of the [Non-Intercourse] Act, a plaintiff must show that . . . the trust relationship between the United States and the tribe has not been terminated or abandoned"); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979); *Mashpee*



*Tribe v. Secretary of the Interior*, 820 F.2d 480, 482 (1st Cir. 1987).[4] Stated differently, if at any point tribal status ceases, Indian country status ceases.[5]

It does not matter that the tribe is currently a federally recognized tribe: "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Non-Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still [seek] an ultimate judicial determination of its claim under the Non-Intercourse Act." *Id.* at 58.

OIN is mistaken in asserting that the Second Circuit's decision below does not conflict with *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987). *Mashpee* makes clear that a tribe may recover under the Non-Intercourse Act only if it shows that it was in continuous tribal existence and did not abandon tribal status from the time disputed land was alienated until the time of suit. 820 F.2d at 482.[6]

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[4] As Judge Van Graafeiland observed in dissent below, "authoritative sources" have explained the significance of tribal discontinuity on aboriginal rights. (Petition at 25-27).

[5] It is correct that the Second Circuit noted, "if continuous tribal existence were required, the record before us shows it." (OIN Br. at 22-23). The record belies that. The Second Circuit did not address any of the substantive evidence presented by Sherrill – which surely established a disputed issue of fact barring summary judgment – other than the careful consideration given by Judge Van Graafeiland in dissent.

[6] OIN repeatedly relies upon *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919) as probative of the Oneidas' continuous tribal existence for the last 200 years. *Boylan* only addresses evidence of the status of the tribe at a single point in time nearly one hundred years ago.

There was substantial evidence presented below that the New York Oneidas ceased to exist as a tribe for decades in the late nineteenth and early twentieth centuries. (Petition at 27-29). That evidence created a triable issue of fact as to termination of tribal status and intent to abandon tribal status (contrary to the suggestion at OIN Br. at 25). If tribal status ceased at any point in time, the protections of the Non-Intercourse Act, 25 U.S.C. § 177 ceased at that time, and the only way that the New York Oneidas could recover reservation status for land it purchased was by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). This is yet another reason why the Petition should be granted.

## CONCLUSION

For all of the foregoing reasons and for those set forth before, the Petition should be granted.

January 30, 2004

Respectfully submitted,

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No. 03-855

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IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner*,

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## SUPPLEMENTAL BRIEF FOR PETITIONER

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## SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner, the City of Sherrill ("Sherrill"), submits this supplemental brief pursuant to Supreme Court Rule 15.8 to address intervening matter not available at the time of Petitioner's last filing – that is, the amicus brief served by the United States ("US Brief") on May 28, 2004. This Supplemental Brief corrects fundamental errors and omissions in that amicus brief.

1. The United States (US Brief at 2, 8) notes that the 1788 Treaty of Fort Schuyler was entered into by the State of New York without the approval of the federal government. However, no federal government approval of State treaties with Indian tribes was required in 1788. The constitution had not yet become effective and the United States government was operating under the Articles of Confederation. As such, the New York State 1788 Treaty of Fort Schuyler was plainly lawful. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1148 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

2. The United States asserts that the language recognizing and guaranteeing the Oneidas' lands under the 1794 Treaty of Canandaigua, 7 Stat. 44, was "virtually the same" as the language regarding the Senecas' lands. (US Brief at 8-9). That is incorrect. With respect to the Oneidas, article 2 of the 1794 Treaty of Canandaigua acknowledges the reservation established by the State of New York:

> The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the

> free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase. (A141; emphasis added).

On the other hand, as to the Senecas, the specific metes and bounds of the reservation set aside by the federal government are described in detail, and no prior State reservation is mentioned. (A142). Thus, the Oneida reservation is a State reservation and the Seneca reservation is a federal reservation.

3. The United States never explains the effect of the express permission to sell granted to the Oneidas and other tribes in the 1794 Treaty of Canandaigua, and the express right of the people of the United States to purchase: "said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." (A141, 142; emphasis added). The State of New York is among the people of the United States who had the express right to purchase under the 1794 Treaty of Canandaigua.

4. The United States asserts that Petitioner does not dispute that the sales of the parcels at issue in the early nineteenth century violated the Non-Intercourse Act, 25 U.S.C. § 177. (US Brief at 7, 15). That is wrong. Petitioner has always asserted that those sales were lawful because of the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua.

5. The United States asserts (US Brief at 17-18) that the land at issue is Indian country despite the fact that it was neither set aside nor superintended by the federal government. In doing so, the United States ignores this Court's holding in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527, 530 (1998) ("*Venetie*") that federal



set aside and federal superintendence is required for all three prongs of Indian country – reservations, allotments and dependent Indian communities.[1] Contrary to the United States' position, merely identifying land as a "reservation" does not supply the required analysis or proof.

The United States also ignores entirely the fact that, as previously explained, in the 1788 Treaty of Fort Schuyler, the New York Oneidas expressly ceded all of their territory to the State of New York, terminating all aboriginal title. New York then set aside a reservation of approximately 300,000 acres for the New York Oneidas' future use. The 1794 Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create or set aside a reservation for the Oneidas. (Petition at 15-17).

The United States also totally disregards this Court's requirement in *Venetie* of federal superintendence for Indian country status. Instead, the United States joins the Oneidas in the claim that federal superintendence is established simply because federal set aside is established, *i.e.*, because of the provisions in the 1794 Treaty of Canandaigua. (US Brief at 17-18 & n.5). *Venetie*, however, requires both federal set aside and federal superintendence. Treaty provisions, at most, address the issue of federal set aside, not superintendence. Superintendence requires that the federal government "actively controls the lands in question,

---

[1] The United States explains that *Venetie* involved an Indian tribe's claim that certain land was a "dependent Indian community" under 18 U.S.C. § 1151(b) and did not specifically address a claim of reservation status pursuant to 18 U.S.C. § 1151(a) (US Brief at 17-18). That is true as to the land at issue in *Venetie*, but this Court made clear in *Venetie* that the determination of whether land is Indian country is the same, whether such land is claimed to be a reservation, a dependent Indian community or an allotment. *Venetie*, 522 U.S. at 527.

effectively acting as guardian for the Indians." *Venetie*, 522 U.S. at 533. No such superintendence over the land at issue ever occurred.

6. The United States suggests that, when the Oneidas re-acquired the lands at issue, the lands became subject to the restrictions of the Non-Intercourse Act, 25 U.S.C. § 177. (US Brief at 6, 7). On the contrary, there is no suggestion in the record that the Oneidas have treated their re-acquired properties in such a fashion. Rather, the Oneidas have done with the properties as they wish, ignoring state and federal regulation at whim.

7. The United States also fails to address the 1838 Treaty of Buffalo Creek, 7 Stat. 550, in light of this Court's decision in *New York Indians v. U.S.*, 170 U.S. 1, 19 (1898). In *New York Indians v. U.S.*, 170 U.S. 1 (1898), this Court held that, upon execution of the 1838 Treaty of Buffalo Creek, the Oneidas were required to abandon all eastern lands (including lands in New York) and move to Kansas (west of the Mississippi River). *See id.* at 19; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. U.S.*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases").

The United States joins the Oneidas in arguing that the 1838 Treaty of Buffalo Creek was limited to Wisconsin lands, and had nothing to do with lands in New York. (US Brief at 13-14). That ignores the language of the Treaty and the *New York Indians* cases. As the United States concedes, (US Brief at 13), the agreement by the New York Oneidas and others to abandon **all** eastern lands – and not merely Wisconsin lands – was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Contrary to the United States' suggestion (US Brief at 13), however, the word "probably"



did not indicate that the 1838 Treaty of Buffalo Creek might not expressly contain that agreement by the Oneidas and others to abandon all eastern lands; rather, the word "probably" merely indicated some possibility that another inducement was the main inducement.

This Court in *New York Indians* expressed no doubt that the New York Oneidas agreed to abandon all eastern lands, including New York, in the 1838 Treaty of Buffalo Creek. Further, the judgment in *New York Indians* was not limited to lands in Wisconsin; and the New York, Wisconsin and Thames Oneidas all shared in a nearly $2 million recovery. *See id.* at 19; *United States v. New York Indians*, 173 U.S. at 468-69; *New York Indians v. U.S.*, 40 Ct. Cl. at 457-61; *In re Appeal of New York Indians*, 41 Ct. Cl. at 468-72.

8. The United States also ignores serious factual disputes – established without any discovery – as to whether the Oneidas maintained a continuous tribal existence from the time the reservation was allegedly established to when the lands at issue were repurchased. (US Brief at 15-17).

The Second Circuit concluded that a federally recognized tribe need not have maintained continuous tribal existence in order to sustain a claim to reservation land. That is not the law. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*") ("To establish a *prima facie* case based on a violation of the [Non-Intercourse] Act, a plaintiff must show that . . . the trust relationship between the United States and the tribe has not been terminated or abandoned"); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482 (1st Cir. 1987). Stated differently, if at any point tribal status ceases, Indian country status ceases.

The United States suggests that federal recognition of the Oneidas as a tribe is entitled to substantial, if not dispositive, weight. (US Brief at 15-16). But the record is barren as to the basis for, or the effect of, that determination. Moreover, it does not matter that the tribe is currently a federally recognized tribe: "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Non-Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still [seek] an ultimate judicial determination of its claim under the Non-Intercourse Act." *Id.* at 58.

The United States also argues that the record below – without even the benefit of discovery – established merely that there had been fluctuations of tribal activity. (US Brief at 16). That usurps the factfinder's role after discovery and trial. There was substantial evidence presented below that the New York Oneidas ceased to exist as a tribe for decades in the late nineteenth and early twentieth centuries. (Petition at 27-29). That evidence created a triable issue of fact as to termination of tribal status and intent to abandon tribal status.

9. Finally, the United States asserts that this case is not of sufficient importance to merit this Court's exercise of certiorari jurisdiction because it only involves a small portion of the 250,000 acres bought by the State of New York from the Oneidas. (US Brief at 19-20). That ignores the significance of the Second Circuit's decision on the ongoing Oneida, Seneca and Cayuga litigations in the Second Circuit, and on the tax base of the myriad municipalities within the vast land claim areas.

The United States concedes that it has been litigating side-by-side with the Oneidas, Senecas and Cayugas in the



Second Circuit for decades. (US Brief at 19-20). The United States' partisan views aside, this case presents clear and important issues of Indian law that are ripe for determination.

## CONCLUSION

For all of the foregoing reasons and for those set forth previously, the Petition should be granted.

June 2, 2004

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# In the Supreme Court of the United States

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*v.*

ONEIDA INDIAN NATION OF NEW YORK, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

In 1997 and 1998, respondent Oneida Indian Nation of New York purchased certain parcels of property in Sherrill, New York through open market transactions. The parcels are situated within the boundaries of the Oneida Indian Nation reservation secured by the 1794 Treaty of Canandaigua, but in the early 1800s were the subject of conveyances involving the State of New York that violated the federal prohibition on the sale of Indian lands without federal approval. The question presented is whether the parcels reacquired by the Tribe are immune from state and local taxation.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

## INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. The position of the United States is that the petition for a writ of certiorari should be denied.

## STATEMENT

1. a. Respondent Oneida Indian Nation of New York (Tribe) is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation (Oneida Nation), a member of the Six Nations of the Iroquois Confederacy. The Oneida Nation's aboriginal homeland comprised some six million acres that formed a 50-miles-wide swath extending in a north-south direction through what is now east-central New York. See *County of Oneida* v. *Oneida Indian Nation* (*Oneida II*), 470 U.S. 226, 230-231 (1985); *Oneida Indian Nation* v. *County of Oneida* (*Oneida I*), 414 U.S. 661, 664 (1974).

After the Revolutionary War, the United States entered into the Treaty of Fort Stanwix of October 22, 1784, with the Six Nations. 7 Stat. 15. That Treaty gave peace to the four Nations that had sided with the British and provided that

the Oneida and Tuscarora Nations—which had sided with the colonists—"shall be secured in the possession of the lands on which they are settled." Arts. 1, 2, 7 Stat. 15. In 1785 and 1788, the State of New York—without the approval of the federal government—obtained cessions of certain of the Oneida Nation's lands. In the 1788 Treaty of Fort Schuyler, the Oneida Nation ceded the bulk of their lands—some 5 million acres—"to the people of the State of New York forever," but "reserved" for the Oneida Nation, also "forever," a tract of approximately 300,000 acres near Oneida Lake. Pet. App. 136a-137a (quoting treaty).

b. In 1790, Congress passed the first of the Trade and Intercourse Act that have long embodied essential features of federal Indian policy. Ch. 33, 1 Stat. 137. Section 4 of that Act provided that "no sale of lands made by any Indians * * * shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138. Section 8 of the Trade and Intercourse Act of 1793, ch. 19, 1 Stat. 319, carried forward the substance of that prohibition. The 1793 prohibition was then carried forward by Congress without change in the Trade and Intercourse Acts of 1796, 1799, 1802, and 1834, and it remains in effect today. See 25 U.S.C. 177.

c. Following the passage of the 1793 Act, the United States and the Six Nations entered into the Treaty of Canandaigua of November 11, 1794. 7 Stat. 44. In Article 2 of the 1794 Treaty, the United States "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property," including the 300,000 acres reserved to the Oneida Nation under the 1788 Treaty of Fort Schuyler. 7 Stat. 45. The United States further stipulated that "the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Ibid.* See Pet. App. 141a-143a.



In 1795, the State of New York—without federal approval—negotiated directly with the Oneida Nation to purchase some of the lands that were secured by the Treaty of Canandaigua. *Oneida II*, 470 U.S. at 232. The federal government warned that title to the Six Nation's land could be extinguished only by a treaty entered into under the authority of the United States. *Ibid.*; see also Resp. Br. App. 1a-4a (Attorney General opinion forwarded to Governor of New York). The State ignored those warnings and, in the summer of 1795, purchased approximately 100,000 acres of land from the Oneida Nation for an annual cash payment of about $3000 (or about $.03 per acre). 470 U.S. at 232. The State later subdivided and resold the land to private parties at significantly higher prices than it had paid the Oneida Nation for the land. See Pet. App. 9a.

The State subsequently engaged in numerous additional transactions—also without federal approval—in which it purchased land from New York Indians. All told, during the late eighteenth and early nineteenth centuries, New York negotiated more than 30 treaties with the Oneida Nation. By 1846, the Oneida Nation retained only a few hundred acres in New York. Pet. App. 9a.

d. Beginning as early as 1815, the State urged the removal of the New York Indians to the West. See *New York Indians* v. *United States*, 170 U.S. 1, 5 n.1 (1898). In 1816, the President gave the New York Indians permission to negotiate with western Tribes for the purchase of land. In 1821, the Menominee Indians ceded some of their land in Wisconsin to several New York Tribes, including the Oneida Nation. A portion of the Oneida Indians moved to Wisconsin, but others remained in New York. Because of a dispute between the New York Indians and the Menominees, the United States entered into the Treaty of February 8, 1831 with the Menominees to purchase some of the Menominees' lands for the New York Indians. 7 Stat. 342-343, 346. However, few additional New York Indians moved from New York to Wisconsin. See Pet. App. 10a & n.8.

On January 15, 1838, the United States entered into the Treaty of Buffalo Creek with the New York Indians to exchange their land in Wisconsin for a new reservation comprising some 1.8 million acres in the Indian Territory, in what is now the State of Kansas. 7 Stat. 550. But the Oneida Indians residing in New York refused to relocate to Kansas. Hundreds of New York Oneidas moved instead to Wisconsin and to Ontario, Canada. "[A]s the exodus of [Oneida] members continued over the next half-century, reservation acreage inhabited by Oneidas shrank significantly, by some accounts to less than 100 acres." Pet. App. 14a. By 1848, only about 200 Oneidas still resided in New York. *Id.* at 13a.

After virtually no New York Indians moved to the Indian Territory, the reservation set aside for them in Kansas pursuant to the 1838 Treaty of Buffalo Creek was restored to the public domain and later disposed of by the United States. The Wisconsin lands ceded by the New York Indians under the Treaty of Buffalo Creek also were made part of the public domain and disposed of by the United States. *New York Indians*, 170 U.S. at 12-13 n.13.

e. In 1997 and 1998, the Tribe purchased in open market transactions from non-Indians fee simple title to certain parcels of land in the City of Sherrill in Oneida County, New York. It is undisputed that the parcels are within the historical boundaries of the 300,000-acre reservation secured by the 1794 Treaty of Canandaigua. Pet. App. 8a n.5, 19a, 85a, 90a-91a. The Tribe operates a gas station, convenience store, and textile facility on the parcels. *Id.* at 2a, 64a. Petitioner City of Sherrill assessed property taxes against the parcels. After the Tribe refused to pay the property taxes, petitioner initiated proceedings against the Tribe to collect the taxes, purchased three of the parcels at a tax sale, and then commenced eviction proceedings. *Id.* at 65a-66a.

2. In 2000, respondents—the Tribe and individual tribal members—brought this action in the United States District Court for the Northern District of New York, alleging that the parcels described above are immune from state and local taxation and seeking declaratory and injunctive relief. The



district court granted summary judgment for the Tribe. Pet. App. 61a-133a. The court held that the parcels are within the boundaries of the Oneida reservation acknowledged by the 1794 Treaty of Canandaigua, *id.* at 85a, 90a-91a; Congress has never disestablished that reservation, *id.* at 100a; and tribally owned land within the 1794 reservation "is Indian Country and is not taxable by Sherrill and the Counties," *id.* at 105a. The court stressed that its decision "appl[ied] narrowly to the parcels at issue in the lawsuit, which are currently possessed by the Nation," and not to "any private landowners." *Id.* at 102a.

3. The court of appeals affirmed the district court's judgment that the parcels at issue are not taxable. Pet. App. 1a-60a.

a. The court of appeals concluded the parcels at issue qualify as Indian country because they "are located on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua." Pet. App. 24a. The court explained that "reservation land" is "by its nature * * * set aside by Congress for Indian use under federal supervision," and thus qualifies as Indian country as discussed in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Pet. App. 24a. The court rejected petitioner's argument that Congress had disestablished the 1794 reservation in the 1838 Treaty of Buffalo Creek and concluded instead that Congress "has never changed" the reservation status of the land. *Id.* at 26a; see *id.* at 33a-41a.

The court of appeals noted that much of the reservation land had been conveyed to New York and then to private parties without federal approval, but explained that "when Indian land has been alienated in ways inconsistent with federal law [*i.e.*, the Trade and Intercourse Act], Indian title remains with the tribe." Pet. App. 25a. The court noted that "[t]he Indian-country status of the alienated land is irrelevant for tax purposes when non-Indians hold fee title, since they pay state taxes," but "when the tribe holding Indian title reacquires former reservation land, both forms of title coexist" (*i.e.*, Indian title and fee title). *Id.* at 27a-28a. In

those circumstances, the court concluded, "the state cannot tax [the land] and the tribe can no longer legally alienate it, at least without federal approval." *Id.* at 28a.

The court of appeals rejected petitioner's argument that the Tribe is not entitled to enjoy the rights that long ago were secured to its reservation lands—and that protect the land from alienation without federal approval today—on the ground that the Tribe itself has not continuously existed. Pet. App. 42a-45a. The court explained that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." *Id.* at 42a. In the alternative, the court found that the record demonstrates that the Tribe has continuously existed as "a direct descendant of the original Oneida Indian Nation." *Id.* at 44a.

b. Judge Van Graafeiland dissented in part. Pet. App. 53a-60a. He concluded that "[t]he record presents significant, unresolved questions of fact as to whether the Oneida Indian Nation of New York has been in existence continuously over the last century and a half." *Id.* at 60a.

## DISCUSSION

The petition for certiorari should be denied. Applying settled principles of federal Indian law to the unique historical and factual circumstances of the Oneida Indians and their treaty-protected lands, the court of appeals correctly held that the parcels at issue are immune from state and local taxation. The parcels are located within the boundaries of the reservation that was recognized by the United States in the 1794 Treaty of Canandaigua as belonging to the Oneida Nation. Although much of that reservation land was subsequently conveyed by the Tribe to the State of New York and then to private parties, petitioner does not dispute that those transactions violated the Indian Nonintercourse Act, 25 U.S.C. 177. Nor was the reservation otherwise lawfully disestablished, by Act of Congress or Treaty. Accordingly, when property within the reservation is reacquired by the Tribe, the land is entitled to the same immunity from



state and local taxation that tribal land in a reservation presumptively enjoys. Moreover, when the parcels were reacquired by the Tribe, they again became subject to the federal restraint on alienation imposed by 25 U.S.C. 177. That restraint independently renders the parcels immune from state and local taxation.

The court of appeals' decision in this case does not conflict with any decision of this Court or of another court of appeals. The parcels at issue represent only a tiny fraction of the roughly 250,000 acres of Oneida land that were allegedly acquired by New York without the approval of the federal government between 1795 and the early 1800s. Those lands are the subject of ongoing litigation in the lower courts, including a lawsuit—in which the United States has intervened on behalf of the Tribe—seeking compensation for the illegal deprivation of the Tribe's possessory rights to those lands. This case—involving only immunity from state and local taxation of lands the Tribe has reacquired—presents no occasion to consider issues arising in those other cases concerning rights of possession in lands that the Tribe has not reacquired.

### A. The Court Of Appeals Correctly Concluded That The Parcels At Issue Are Immune From State And Local Taxation

1. The Court has long held that "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985). The States and their political subdivisions are thus "without power to tax reservation lands," except in those rare instances when Congress authorizes such taxation. *County of Yakima* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992); see *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-112 (1998); *New York Indians*, 72 U.S. (5 Wall.) 761 (1867) (holding that Seneca land protected by 1794 Treaty was exempt from state taxation). The Court has "consistently declined to find that Congress has authorized such

taxation unless it has 'made its intention to do so unmistakably clear.'" *Cass County*, 524 U.S. at 110 (quoting *County of Yakima*, 502 U.S. at 258). The court of appeals correctly held that the parcels at issue here are immune from taxation under that well-settled rule on the ground that they are owned by the Tribe and located within the boundaries of a federally recognized reservation that has never been abrogated by Congress. Pet. App. 20a.

In *Oneida II*, the Court recognized that, after the Revolutionary War, "the *National Government* promised that the Oneidas would be secure 'in the possession of the lands on which they are settled,'" and that the United States "reaffirmed this promise," *inter alia*, in the Treaty of Canandaigua. 470 U.S. at 231 (emphasis added). Petitioner suggests (Pet. 16) that the 1794 Treaty of Canandaigua did nothing more than acknowledge the 1788 Treaty of Fort Schuyler that was entered into between the State of New York and the Oneida Nation *without* the approval of the federal government. That argument is contradicted by both the text of the 1794 Treaty and the context in which it was negotiated.

Article 2 of the 1794 Treaty does not merely "acknowledge" the existence of a previous agreement with the State; it "acknowledge[s]" the 300,000 acres "reserved to the Oneida" in the 1788 Treaty "*to be their property*" and stipulates that "the said reservation[] *shall remain theirs*, until they choose to sell the same to the people of the United States, who have the right to purchase." Pet. App. 141a (emphasis added). Petitioner concedes (Pet. 16) that Article 3 of the Treaty "expressly establishes a reservation for the Senecas" (who had not previously entered into a treaty with New York). See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 122-123 n.18 (1960). Article 3 uses virtually the same language as Article 2 to recognize and guarantee the Senecas' rights to certain of their lands. See Pet. App. 142a. There is no reason to conclude that Article 3 confers any more rights with respect to the land reserved by the Treaty



for the Seneca Nation than Article 2 does with respect to the land reserved for the Oneida Nation.[1]

Article 4 of the 1794 Treaty, referring to both Articles 2 and 3, recites that "[t]he United States have thus *described and acknowledged what lands belong to* the Oneidas, Onondagas, Cayugas, and Senecas." Pet. App. 142a (emphasis added). In addition, Article 4 promises that the United States will "never * * * claim the same" and "not disturb them * * * in the free use and enjoyment thereof." *Ibid.* In return, the Tribes stipulated "that they will never claim *any other lands*, within the boundaries of the United States." *Id.* at 142a-143a (emphasis added). That quid pro quo identified which of the Tribes' lands would continue to be subject to federal protection and supervision going forward, and effectively ratified the Tribes' relinquishment of their other lands to the State.

The historical context in which the 1794 Treaty was ratified also supports the court of appeals' interpretation of the Treaty. The 1794 Treaty was the third in a series of treaties over ten years (1784, 1789, and 1794) in which "the National Government promised that the Oneidas would be secure" in the possession of their lands. *Oneida II*, 470 U.S. at 231. The 1794 Treaty is thus naturally read in context as providing a "reaffirm[ation]" of the promise first made in 1784. *Ibid.* More important, under the newly ratified Constitution, Indian relations became "the exclusive province of federal law." *Id.* at 234. Only the United States could deal with the Tribes on a sovereign-to-sovereign basis or extinguish Indian title. *Ibid.*; *Oneida I*, 414 U.S. at 667, 670-674; see also *New York Indians*, 72 U.S. (5 Wall.) 761, 769 (1867) (noting that, after Constitution, New York "possessed no power to deal with Indian rights or title").

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[1] In *Oneida I*, this Court recognized that the State's attempt to tax the reservation land referred to in Article 3 of the Treaty of Canandaigua with respect to the Seneca Nation was an invalid "interference with Indian possessory rights guaranteed by the Federal Government." 414 U.S. at 672. The same conclusion follows with respect to the reservation land referred to in Article 2 with respect to the Oneida Nation.

2. Although the general rule is that reservation land is immune from state and local taxation, Congress may abrogate that immunity and, indeed, Congress may revoke the land's reservation status altogether. See *Cass County*, 524 U.S. at 110-111, 113. However, this Court has refused to conclude that Congress has authorized taxation of reservation land "unless it has 'made its intention to do so unmistakably clear.'" *Id.* at 110; see *County of Yakima*, 502 U.S. at 258. And the Court has likewise refused to find that Congress has disestablished a reservation unless its intent to do so is "clear and plain." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984). Petitioner argues that the 1838 Treaty of Buffalo Creek abrogated the reservation recognized by the 1794 Treaty of Canandaigua and revoked the federal protection accorded reservation lands. The court of appeals correctly rejected that argument.[2]

The 1838 Treaty of Buffalo Creek was negotiated by Commissioner Ransom H. Gillet on behalf of the United States with "the several tribes of the New York Indians" (Pet. App. 148a), including the Oneida Nation. In Article 1 of the 1838 Treaty, the New York Indians "cede[d] and

[2] In its amicus brief in *Oneida II*, the United States articulated a possible argument that the Treaty of Buffalo Creek diminished the reservation that was recognized by the Treaty of Canandaigua, but the United States stated that it had not "reached a concluded view on the relinquishment question," and noted that the issue "would require further examination of the circumstances surrounding the Treaty of Buffalo Creek and subsequent events, including the Indians' understanding of the transaction." Nos. 83-1065 & 83-1240 U.S. Br. at 33. The United States' position in this case is based on further consideration of the historical record, including the written assurances made to the Tribe by Commissioner Gillett (see p. 12, *infra*), which the United States did not consider in preparing its brief in *Oneida II*. That position is consistent with the position that the Bureau of Indian Affairs has previously expressed with respect to this case. In January 2001, the Acting Assistant Secretary of the Interior for Indian Affairs of the United States Department of the Interior informed the Mayor of the City of Sherrill that the parcels at issue are situated within an Indian reservation that "has never been disestablished or diminished." C.A. App. 1340 (reproducing letter).



relinquish[ed] to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomone treaty of 1831," save with respect to one tract. *Id.* at 149a. In Article 2, the United States in turn agreed —"[i]n consideration of the above cession and relinquishment"—to set apart 1,824,000 acres of lands in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes." *Ibid.*

In the 1838 Treaty, the United States consented to, and thus consummated, the sale of the New York lands occupied by the Seneca and Tuscarora Nations to non-Indians. See Pet. App. 153a-156a (Articles 10 and 14). In exchange, the Seneca and Tuscarora Nations also appeared to agree to remove to the Kansas reservation within a specified period. See *ibid.* The Treaty did not, however, effect any immediate cession or sale of the Oneida Nation's New York lands. Nor did the Oneidas agree to remove to the Kansas reservation within any fixed period. Rather, in Article 13, the Oneidas "agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.* at 155a.

Petitioner's effort to analogize the situation faced by the New York Oneidas in 1838 to the situation faced by the Walapais Indians (now denominated as the Hualapai Indian Tribe) in *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339 (1941), is flawed. The Hualapais had requested that a reservation be *created* for them because settlers had entered into their aboriginal lands, and such a reservation was established by Executive Order. After discussing the "long standing attempt to settle the [Hualapais'] problem by placing them on a reservation," the Court found that "their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation." *Id.* at 358. The historical setting of the treaty at issue in this case differs in an important respect from that in *Santa Fe*,

because the Oneida Nation—in contrast to the Hualapais, which initially possessed only aboriginal land—already had reservation land in 1838, *i.e.*, the reservation secured by the 1794 Treaty of Canandaigua.

The negotiating history of the 1838 Treaty of Buffalo Creek confirms that the Oneida Nation did not agree to relinquish its possessory rights in the Nation's New York homeland in exchange for the new Kansas lands. In June 1838, the Senate amended the Treaty and directed a federal commissioner to return to each of the signatory Tribes to gain their assent to the Treaty after "fully and fairly explaining" its terms. *New York Indians*, 170 U.S. at 21. Pursuant to that directive, Commissioner Gillet met with the Oneidas on August 9, 1838. Pet. App. 173a. Gillet provided the Oneidas and their attorney with a written "assurance" to quell "their fears that they might be compelled to remove, even without selling their land to the State." Resp. Br. App. 7a. The assurance stated that "the treaty was not, & is not intended to compel the Oneidas to remove from their reservations in the state of New York," and that the Oneidas could "choose to * * * remain where they are forever." *Id.* at 10a. The Oneidas' assent to the 1838 Treaty refers to Gillet's declaration, includes Gillet's affirmation that the assent was voluntary, and was annexed to the ratified document. Pet. App. 35a n.18.

Amicus State of New York argues (at 8) that the court of appeals erred in relying on the Gillet declaration because it "is not annexed to the treaty as reproduced in Statutes at Large and there is no evidence that it was ever approved by the Senate or the President." That argument is misguided. It is undisputed that the President transmitted Gillet's written declaration to the Senate during the Senate's deliberations over ratification, and that the declaration was communicated to the Tribe. See Resp. Br. App. 5a-9a. The declaration is therefore strong contemporaneous evidence of how the Senate, the negotiating parties, and the Tribe in particular understood the Treaty. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e



interpret treaties to give effect to the terms as the Indians themselves would have understood them.").

Petitioner argues that the court of appeals' construction of the 1838 Treaty is inconsistent with *New York Indians*. In that case, the Court held that the New York Indians (including the Oneidas) were entitled to compensation for the government's decision to dispose of the lands set aside for them in Kansas. That holding was based on a finding that the 1838 Treaty conveyed an immediate grant of title in the Kansas lands to the New York Indians. Article 2 of the 1838 Treaty provides, however, that the Kansas lands were set aside "[i]n consideration of the *above* cession and relinquishment," Pet. App. 149a (emphasis added), *i.e.*, the surrender of the New York Indians' *Wisconsin* lands in Article 1.

In *New York Indians*, the Court observed that the primary inducement for the United States to enter into the 1838 Treaty "[p]robably" was the removal of all Indians from their eastern lands. 170 U.S. at 15. But that does not mean that the government attained that objective as a legal matter with respect to every Tribe that signed the Treaty, and the Court recognized that achieving the Oneida Nation's relinquishment of the Wisconsin lands (which the government did achieve) was also an important objective of the United States. *Id.* at 14. Therefore, the fact that the 1838 Treaty immediately granted to the Oneidas title to the Kansas lands—expressly in exchange for lands in *Wisconsin*—does not demonstrate a "clear and plain" congressional intent to disestablish the Oneidas' reservation land *in New York*, which was nowhere mentioned in the Treaty. Much less does the 1838 Treaty manifest an intent to abrogate the New York reservation regardless of whether the Oneidas in fact removed from New York to Kansas.

In *Solem* v. *Bartlett*, this Court observed that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470. Because Congress has not unambiguously revoked the reser-

vation that was recognized and secured by the 1794 Treaty of Canandaigua, land that is reacquired by the Tribe within the boundaries of that reservation retains its reservation status for purposes of immunity from state and local taxation "until Congress explicitly indicates otherwise." *Ibid.*[3]

3. The court of appeals' conclusion that the parcels at issue are immune from state and local taxation independently follows from the fact that the parcels are today subject to the restraint on alienation imposed by the Indian Nonintercourse Act, 25 U.S.C. 177. See Pet. App. 25a-28a. In *Oneida I*, the Court held that the Oneidas' possessory rights in their aboriginal lands were guaranteed by the Trade and Intercourse Acts of 1790 and 1793, which codified the principle "that the extinguishment of Indian title required the consent of the United States." 414 U.S. at 678. It is undisputed that the parcels at issue in this case are within the aboriginal homeland of the Oneida Nation that were conveyed to the State of New York in violation of the Trade and Intercourse Acts. See *Oneida II*, 470 U.S. at 232. Most of the land that was the subject of those improper conveyances was purchased by non-Indians. The proper remedy for those conveyances remains the subject of ongoing litigation. See Part C, *infra*. Whatever the ultimate disposition of that litigation, the court of appeals correctly concluded in this case that the restraint on alienation applies to land that was

[3] The court of appeals' decision is limited to the question "whether the [parcels at issue] are subject to taxation." Pet. App. 2a; see *id.* at 5a, 45a, 101a-102a. The court did not consider, and therefore did not decide, what, if any, additional consequences might flow from the fact that the tribally owned parcels in this case fall within a federally recognized reservation. In any event, non-Indians remain subject to state and local taxation within Indian country, and the tribal sovereign immunity doctrine "does not excuse a tribe from all obligations to assist in the collection of validly imposed state * * * taxes." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991); see also *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994). Moreover, this Court's precedents substantially limit the jurisdiction that a Tribe may assert over non-Indians on reservation lands. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353 (2001).



the subject of such improper conveyances, when it is reacquired by the Tribe. Pet. App. 27a-28a. And, as this Court has recognized, state and local taxation of property subject to the Indian Nonintercourse Act is an improper "interference with Indian possessory rights guaranteed by the Federal Government." *Onieida I*, 414 U.S. at 672.

4. Petitioner does not dispute that the parcels at issue historically have been subject to the Indian Nonintercourse Act. Instead, petitioner argues (Pet. 24) that the Indian Nonintercourse Act does not apply to the parcels today because the Tribe has not been in continuous existence since the parcels became subject to that Act. See Pet. Reply Br. 8-9. The court of appeals correctly rejected that contention, which is at odds with the Executive's own tribal-recognition determination. See Pet. App. 42a-45a.

"[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 124 S. Ct. 1628, 1633 (2004); see *Venetie*, 522 U.S. at 531 n.6. Congress has assigned authority to govern Indian relations to the Secretary of the Interior, including the responsibility to determine tribal existence. See 25 U.S.C. 2, 9; 43 U.S.C. 1457. In exercising that authority, the Department of the Interior has promulgated regulations governing tribal recognition, and those regulations have always included the element of continuous existence. 43 Fed. Reg. 39,361 (1978), revised 59 Fed. Reg. 9280 (1994), currently codified at 25 C.F.R. Pt. 83.

The Department of the Interior has determined that the respondent Tribe is federally recognized and has continuous existence. See 68 Fed. Reg. 68,180 (2003). The Department also has recognized that the Tribe is a political successor-in-interest to the Oneida Indian Nation that signed treaties with the United States in 1784, 1789, 1794, and 1838. See C.A. App. 1520a. That executive determination is entitled to substantial if not conclusive weight. See *Lara*, 124 S. Ct. at 1635; *United States* v. *Sandoval*, 231 U.S. 28, 47 (1913); *United States* v. *Holliday*, 70 U.S. 407, 419 (1866). More-

over, in *Oneida II*, this Court itself recognized that respondent is a "direct descendant[] of members of the Oneida Indian Nation," and it affirmed a decision in favor of respondent based on the Tribe's assertion of a claim that a 1795 conveyance of the Oneida Nation's land violated of the Indian Nonintercourse Act. 470 U.S. at 230.[4]

Petitioner claims that the Oneida Indians ceased to exist as a Tribe around the turn of the twentieth century. Pet. 27-29. At most, the documents cited by petitioner indicate that there has been "fluctuations [in] tribal activity during various years." 43 Fed. Reg. at 39,363. But such fluctuations do not foreclose the conclusion that a Tribe has continuously existed, cf. *United States* v. *John*, 437 U.S. 634, 652-653 (1978), much less provide a basis for a court to override the Executive's determination that a Tribe *has* continuously existed. In any event, ample evidence demonstrates that the United States continued its historic course of dealings with the Oneida as a Tribe during the late nineteenth and early twentieth centuries. For example, during this period, the United States continued to honor its obligations under the 1794 Treaty of Canandaigua to pay annuities and deliver "treaty cloth" to the Oneida Nation. See C.A. App. 1506a-1518a; *Oneida Indian Nation*, 434 F. Supp. at 538. In addition, in the early 1900s the United States brought an ejectment action, in its trust capacity, on behalf of the Oneidas against private parties who had claimed title to a 32-acre tract of land within the boundaries of the reservation recognized by the Treaty of Canandaigua that the government asserted had never lawfully been alienated from the Oneida Nation's 1794 reservation. See

[4] The lower courts have uniformly treated the Tribe as having standing to enforce rights established in treaties signed by its historic predecessor, the Oneida Nation. See, *e.g.*, *Oneida Indian Nation* v. *United States*, 26 Ind. Cl. Comm. 138, 149 (1971), aff'd, 201 Ct. Cl. 546 (1973); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527, 532-533, 538, 540 (N.D.N.Y. 1977); *Oneida Indian Nation* v. *County of Oneida*, 719 F.2d 525, 527-528, 539 (2d Cir. 1983); *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d 104, 118-119 (N.D.N.Y. 2002).



*United States* v. *Boylan*, 256 F. 468, 478 (N.D.N.Y. 1919), aff'd, 265 F. 165 (2d Cir. 1920); Pet. App. 44a-45a. It is undisputed that the Tribe lawfully occupies that reservation land today. See Pet. App. 43a; Resp. Br. in Opp. 8-9.

### B. The Court Of Appeals' Decision Is Consistent With *Alaska* v. *Native Village of Venetie Tribal Government*

Petitioner argues (Pet. 13-19) that the decision below conflicts with *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). That is incorrect. In *Venetie*, the Court considered whether land owned in fee by the Native Village of Venetie—which lacked reservation status and was not subject to a federal restraint on alienation—"falls within the 'dependent Indian communities' prong of the [Indian country] statute, [18 U.S.C.] § 1151(b)." 522 U.S. at 527. The Court held that Section 1151(b) "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements —first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Ibid.*

In concluding that the tribally owned land at issue in *Venetie* did not fall into that "limited category," the Court focused on the Act of Congress—the Alaska Native Claims Settlement Act (ANSCA)—that resulted in the transfer of the land at issue first to unique state-chartered Native corporations and then by those corporations to the Native Village of Venetie. The Court emphasized that "it is significant that ANSCA, far from designating Alaskan lands for Indian use, *revoked* the existing Venetie Reservation, and indeed revoked all existing reservations in Alaska * * * save one." 522 U.S. at 532 (emphasis added). As the Court explained, "[i]n no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands." *Ibid.* The Court also explained that the former reservation lands that were transferred pursuant to ANSCA

were transferred "without any restraints on alienation or significant use restriction[s]." *Ibid.*

The court of appeals' conclusion that the parcels at issue in this case are immune from state and local taxation was not based on a finding that they qualify as a dependent Indian community—*i.e.*, the "limited category of Indian lands" at issue in *Venetie*. 522 U.S. at 527. Rather, the court of appeals based that conclusion on the facts that the "[p]roperties are located on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua," Pet. App. 24a, and that "Congress has never changed" the reservation status of that land, *id.* at 26a. In *Venetie*, this Court reaffirmed the "not surprising[]" principle "that Indian reservations [a]re Indian country." 522 U.S. at 528 n.3; see *id.* at 527 n.2. The court of appeals' decision therefore dovetails with *Venetie*. Whereas the Court in *Venetie* based its determination that the land at issue was not Indian country on the fact that Congress had explicitly "*revoked* the existing Venetie Reservation," *id.* at 532 (emphasis added), the court of appeals here based its Indian-country determination on the fact that the parcels at issue "are located on reservation land, *a status which Congress has never changed*." Pet. App. 26a (emphasis added).[5]

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[5] Petitioner argues (Pet. 13-19) that the reservation land in this case does not meet the criteria discussed in *Venetie*. That is incorrect. In *Venetie*, the Court emphasized that "[t]he federal set-aside requirement * * * reflects the fact that * * * some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to *create or to recognize* Indian country." 522 U.S. at 531 n.6 (citations omitted). As discussed above, the Treaty of Canandaigua explicitly recognized and guaranteed protection to the Oneida Nation's reservation. In addition, the *Venetie* Court recognized that federal government may superintend Indian lands through "federal restrictions on the lands' alienation." *Id.* at 528 & n.4 (discussing 25 U.S.C. 177). Whereas Congress had explicitly removed such restrictions from the fee land in *Venetie*, *id.* at 532-533, the parcels in this case remain subject to 25 U.S.C. 177. See *Venetie*, 522 U.S. at 531 n.5 (discussing, *inter alia*, *United States* v. *Pelican*, 232 U.S. 442, 447 (1914), in which the Court observed that the allotments that were subject to "restrictions upon alienation or provision for trusteeship on the part of the Government" were subject to federal supervision, *id.* at 449); *United States* v. *Candelaria*, 271 U.S. 432, 441 (1926) (Pueblo fee land subject to federal superintendence). The federal government's guardianship role with respect to tribally owned land within the reservation recognized by the Treaty of Canandaigua has been manifested in additional ways, including the government's support for the Tribe in land claims litigation (see Part C, *infra*). See Resp. Br. in Opp. 19 n.6; C.A. App. 1521-1524 (Department of Interior approvals under 25 U.S.C. 81).



### C. This Case Does Not Present The Broader Issues Raised By The Ongoing Oneida Land Claims Litigation

The parcels at issue here represent only a tiny fraction of the roughly 250,000 acres of Oneida land that allegedly were acquired by New York unlawfully—without the approval of the federal government—between 1795 and the early 1800s. The United States has intervened on behalf of the Tribe in a law suit seeking, *inter alia*, damages for the two centuries in which the Indians have been illegally deprived of their possessory rights to those lands. See, *e.g.*, *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d at 118-119. The United States has also intervened in similar suits by other New York Tribes, including two cases that are currently pending in the Second Circuit.[6]

This case does not present a number of issues being litigated in the land claims cases. For example, petitioner does not seek review of the lower courts' findings that New York's original acquisition of the parcels at issue was invalid under the Trade and Intercourse Act. That issue is being contested by the State and other defendants in the land claims litigation. In addition, petitioner has not pressed the argument, which has been made in other cases, that the New York Indians' present-day right to assert their land claims has been extinguished by laches or other equitable principles. Cf. *Oneida II*, 470 U.S. at 256-273 (Stevens, J., dissenting, joined by White, J., and Rehnquist, J.).

Even if the Court concluded that it may wish to revisit the complex issues surrounding the longstanding efforts of New

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[6] *Seneca Nation* v. *New York*, No. 02-6185 (2d Cir. argued Oct. 20, 2003); *Cayuga Indian Nation* v. *Pataki*, No. 02-6111(L) (2d Cir. argued Mar. 31, 2004).

York Indians to vindicate their possessory interests in their aboriginal lands, this case—which involves taxation of land that the Tribe has reacquired—would not be a suitable vehicle for resolution of the full range of those issues. Rather, in that event, it would be appropriate for the Court to await resolution of the ongoing litigation in the lower courts in which the United States and the New York are both parties, and in which the record is being fully developed on various matters that ultimately may bear on the status of land within the boundaries of the reservation recognized by the United States in the 1794 Treaty of Canandaigua.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner,*

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, AND IVA ROGERS,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## AMICUS BRIEF BY THE COUNTIES OF MADISON AND ONEIDA, NEW YORK, IN SUPPORT OF THE PETITION

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The Counties of Madison and Oneida, New York ("Counties"), submit this amicus brief in support of the Petition for a Writ of Certiorari of the City of Sherrill, New York, seeking review of *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Counties fully support the arguments advanced by the City of Sherrill in its Petition and by the State of New York in its amicus brief, but would like to bring to this Court's attention additional matters relating to the questions presented.

## STATEMENT OF INTEREST

The parcels owned by the Respondent Oneida Indian Nation of New York ("the Oneidas") are within the Counties, as is all of the area claimed by respondent to be Indian country. The Counties are defendants in related actions filed by the Oneidas in the United States District Court for the Northern District of New York.

## INTRODUCTORY STATEMENT

The Oneidas were previously before this Court in two related appeals. In *Oneida I*, 414 U.S. 661 (1974), the Court recognized that their complaint alleged a federal claim, *id.* at 677-78; and in *Oneida II,* 470 U.S. 226 (1985), they sought to affirm a judgment for $16,694 plus interest representing two years of rent on 872 acres of land owned by the Counties. The judgment was affirmed, although the majority joined with the United States in recognizing "the potential consequences" of the Court's decision. *Id.* at 253. The Court was apparently sufficiently troubled that it expressly disclaimed any "opinion as to whether other considerations [specifically including equitable] may be relevant to the final disposition . . .." *Id.* at 253 n.27. Neither this Court nor the United States as amicus curiae, however, foresaw that the Oneidas would claim the right to treat as Indian country and assert political jurisdiction over a large area in central New York State without any action or superintendence by the United States. The dissent presciently noted:

> This decision upsets long-settled expectations in the ownership of real property in the Counties of Oneida and Madison, New York, and the disruption it is sure to cause will confirm the common-law wisdom that ancient claims are best left in repose . . . . The Court, no doubt, believes that it is undoing a grave historical injustice, but in so doing, it has caused another . . . .

*Id.* at 273.

Since then, the Oneidas have expanded their land claim to 250,000 acres,[1] and attempted to extend the decisions in *Oneida I* and *Oneida II* beyond any fair reading. The Oneidas purchased properties within the land claim area, and unilaterally declared them to be Indian country, not subject to state or local jurisdiction. The City of Sherrill rejected the Oneidas' declaration of sovereignty, resulting in this case in which the lower courts (on summary judgment) made potentially far-reaching decisions in the context of an action to enjoin taxation of two parcels of land by the smallest city in New York. The errors below not only have a potential impact on the Land Claim Case, but also allow the Oneidas unilaterally to eviscerate state and local jurisdiction over land they acquire.

This case raises issues that were not fully presented or addressed in *Oneida II*. For instance, the Court noted, in discussing historical background, that "in 1788, the State entered into a 'treaty' with the Indians, in which it purchased the vast majority of the Oneidas' land. The Oneidas retained a reservation of about 300,000 acres . . . ." *Oneida II*, 470 U.S. at 231. The Court, however, was not asked to determine whether the 1788 Treaty of Fort Schuyler ceded all of the interest of the Oneidas and extinguished their aboriginal title. Lower courts have rejected defenses based on the 1788 Treaty, mistakenly believing the issue is foreclosed by *Oneida II*. *See, e.g.*, *Land Claim Case*, 194 F. Supp. 2d at 121; *Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 234 (N.D.N.Y. 2001). *Oneida II* affirmed a $16,694 judgment entered after a trial at which the Counties – among the weakest in New York – presented no evidence (*see Oneida Indian Nation of New York v. County of Oneida,* 434 F. Supp. 527, 532 (N.D.N.Y. 1977)), holding that the Counties' violated the Oneidas' federal common-law right to possess 872 acres of land, that Congress did not preempt the federal common-law right by virtue of the 1793 Trade and Intercourse Act, and that the Counties' affirmative defenses (statute of limitations, abatement, ratification by the Treaties of 1798 and 1802, and nonjusticiability) did not apply. *Oneida II*, 470 U.S. at 233-250. The issues raised in this case are not foreclosed by *Oneida II*.

Finally, the Counties note that the United States submitted an amicus brief in *Oneida II*, asserting that equitable principles "plainly do apply where, as here, the United States has declined to sue to vindicate an abiding sovereign interest . . . ." (Br. for the United States as Amicus in *Oneida II*, at 34 (appended hereto at A1-A2)). In this case, in which the unilateral declaration of Indian country sovereignty raises equitable considerations many times more powerful than a claim for two years' rent, the United States is conspicuously absent.

## BACKGROUND

The Counties, created in 1798 and 1806, are located in central New York State and encompass the 300,000 acre ancient Oneida Indian reservation created by the State in the 1788 Treaty of Fort Schuyler. This Court has already noted that the land conveyed by the Oneidas was "converted from

[1] *See, e.g., Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) (the "Land Claim Case"). The Land Claim Case involves the Oneidas' claim to possessory rights to approximately 250,000 acres located in the Counties. Considerable resources have been devoted to fully and comprehensively litigate the issues in that case, which is currently in expert discovery.

wilderness to cities, towns, villages and farms." *Oneida II* at 265-66. Over the past two centuries, the Oneida Indians largely removed from New York. By 1999, the census reported that Indians represented less than 0.3% (907) of the total population of the Counties (304,910).[2] However, in the past ten years the Oneidas, who in the late nineteenth century were no longer known as a tribe in New York and had assimilated into the community, *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877), have purchased in a checkerboard fashion more than 16,000 acres scattered within the Counties without any superintendence or involvement by the United States. Upon acquisition, the Oneidas unilaterally declared the parcels to be Indian country and ceased payment of real property taxes. Emboldened by their reading of *Oneida II*, they also refused to collect and remit taxes on all goods and services sold to non-members of the Tribe even though this Court has ruled such exchanges taxable. *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994).

This unilateral declaration of sovereignty by less than 0.3% of the population has significantly impacted the remaining 99.7% of the residents of the Counties. The resulting annual tax shortfall for Madison County is approximately $1 million for real property taxes and an estimated $5 million for sales taxes. For Oneida County the annual tax shortfall is $500,000 for real property taxes and an estimated $3-5 million for sales taxes.

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[2] The history and legal significance of the Oneidas' removal from (and assimilation into) New York is discussed by the Counties at length in their amicus Memorandum in Opposition to the Oneida Indian Nation of New York's Motion for Summary Judgment, reproduced in the Joint Appendix filed with the Second Circuit below (hereinafter "JA") at 950-979. Suffice it to say, the United States determined through its agencies that, by the 1890s, the Oneidas had no reservation, were few in number, and were considered citizens of New York. (JA at 964-970).



The refusal to collect sales and excise taxes (which account for approximately 1/3 of the cost of cigarettes and gasoline) has enabled the Oneidas to charge lower prices and place all non-Indian competitors at a disadvantage. To illustrate, in 1997 there were twenty-eight gasoline station / convenience stores in the area, of which the Oneidas owned two. Since then the Oneidas opened two new stores and purchased eight competitors, and six other competitor stores closed. Currently, only ten non-Oneida stores collect and remit taxes while the Oneidas operate twelve "tax free" stores. In Madison County, the combined sales and property tax loss has had the greatest impact on the non-Indian community where the County has had to raise property taxes by 33.8% over the last three years.

The Oneidas' offer to local taxing authorities a substitute for lost taxes called a Silver Covenant Chain Grant. It is little more than a public relations gimmick and a poor substitute for a reliable tax revenue stream since the payments are voluntary and can be discontinued for improper purposes at the whim of the Oneidas. For example, the Oneidas have used these voluntary payments in an attempt to exert improper influence over local government. *See, e.g.*, Press Release of Stockbridge Valley Central School District (Jan. 8, 2004) ("[T]he revocation of the [Silver Covenant Chain] funding appears to have arisen from an intra-tribal dispute that resulted in demands by the Nation's representative, Chuck Fougnier, for the firing of a Native American school employee.") (appended hereto at A3-A5); *see also,* Elizabeth Rinaldo, *SVCS faces budget cuts in wake of grant loss*, Oneida Daily Dispatch, January 12, 2004 at 1 (appended hereto at A6-A9). Moreover, unlike property taxes, the Oneidas' proposed voluntary payments are not based on present assessed value. The notion that these unenforceable payments are better than property taxes, (Br. for Appellees, *City of Sherrill*, Nos. 01-7795, -7797, at 2 (2d Cir.)), should be dismissed out of hand.

In addition to the impact on tax revenues and other taxpayers, the very fabric of the area's governance is severely compromised by the Oneidas' declaration that its patchwork of parcels is sovereign and therefore exempt from state and local law. This includes the network of local and state police powers, environmental protection laws, land use, safety and fire codes, and civil rights protections that evolved over the past two centuries. Basic principles of democracy in effect for hundreds of years – such as electing local leaders to establish and implement comprehensive, integrated policies for the area – are effectively destroyed.

## SUMMARY OF THE ARGUMENT

Sherrill's enforcement of its real property tax assessments depends on whether the parcels are, today, within Indian country – notwithstanding the passage of almost two centuries of settlement, cultivation and use pursuant to treaties,[3] willingly made, between New York State and the Oneidas beginning in 1785. In answering this question, the Second Circuit erred by (1) using the wrong legal standard to interpret two critical treaties, and (2) misreading the scope and applicability of the Indian Trade and Intercourse Act, (3) in violation of the Tenth Amendment of the Constitution of the United States.

## ARGUMENT

### 1. The Court of Appeals Used the Wrong Legal Standard to Interpret Two Critical Treaties

According to the Second Circuit, "[t]here is no material dispute that the Sherrill Properties were part of the Oneidas' aboriginal land and the tribe's reservation as recognized by the Treaty of Canandaigua." 337 F.3d at 153. In fact, both these matters – the aboriginal status of the land, which was

[3] The federal government approved of New York's purchases and took no action to prevent them. *See Oneida Nation of New York v. United States*, 43 I.C.C. 373, 405 (1978).



extinguished by the 1788 Treaty of Fort Schuyler, and the effect of the 1794 Treaty of Canandaigua – are contested.[4] The Second Circuit erred by improperly construing the applicable treaties generously in favor of the Oneidas.

Although the principle of generous construction is often appropriate when analyzing Indian treaties, it may not be used to divest a state of its land. *United States v. Minnesota*, 270 U.S. 181, 209 (1926); *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1163-64 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); *Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 530 (W.D.N.Y. 2002). This Court held in *Minnesota* that a treaty cannot be construed to divest a state's rights in land "unless the purpose to do so be shown in the treaty with such certainty as to put it beyond reasonable question." *Minnesota*, 270 U.S. at 209. By wrongly applying the doctrine of generous construction, the Second Circuit misinterpreted critical treaties to divest New York State of its property interest in, and jurisdiction over, 300,000 acres of its land. The Second Circuit also ignored contrary interpretations by renowned legal authorities (including this Court) that were given much closer in time to the treaties in question.

#### a. The 1788 Treaty of Fort Schuyler Between New York and the Oneidas

In a single sentence in a footnote, the Second Circuit below dismissed the argument that the 1788 Treaty of Fort Schuyler (appended hereto at A10-A14) effected a transfer of all of the Oneidas' land to New York, extinguished forever aboriginal title, and created a state reservation. 337 F.3d at 156 n.13. Instead, the Second Circuit interpreted the treaty generously in the Oneidas' favor as "carv[ing]-out" 300,000 acres that "never became state land" and in which aboriginal

[4] *See, e.g.*, JA at 28-29, 55-56, 365, 864-65.

title survived. *Id.*[5] In so holding, the Second Circuit disregarded the rule of construction mandated by *Minnesota*, and its conclusion is inconsistent with the language of the treaty, New York law, and other early authorities.

In its first article, the 1788 Treaty states: "The Oneidas do cede and grant ***all their lands*** to the people of the State of New York ***forever***." (Emphasis added). In the second article, New York set apart for the Oneidas a tract from "the said ceded lands" that was "reserved for . . . several uses," including a portion of which the Oneidas could use and cultivate (but not sell, lease, or alienate in any way), and the balance of which could be leased to others, subject to certain restrictions.

The effect of the plain treaty language was to convey all the Oneidas' land to New York and thereby extinguish aboriginal title. New York, as the sovereign vested with the right of preemption,[6] acquired absolute fee title to "***all*** [the

[5] The district court opinion cited as authority by the Second Circuit likewise misapplied the principle of generous construction. *See Oneida Indian Nation of New York v. State of New York*, 194 F. Supp. 2d 104, 139 (N.D.N.Y. 2002). The district court reached its decision, in part, on the authority of this Court's statement in *Oneida II* that "the Oneidas retained a reservation of about 300,000 acres" under the 1788 Treaty of Fort Schuyler. *Id.* (quoting *Oneida II*, 470 U.S. at 231). This Court's statement, in turn, reflected a finding by the trial court that the Oneidas' "were left with a reservation of about 300,000 acres" as a consequence of the 1788 Treaty of Fort Schuyler. *Oneida Indian Nation of New York State v. County of Oneida*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977). The trial court (and the parties) in *Oneida II* appear to have assumed that this "reservation" of land to the Oneidas preserved the Oneidas' aboriginal title, as opposed to extinguishing the Oneidas' original Indian title and granting them a state-law-based property right. *Id.* at 538.

[6] During the confederal period, New York was the sovereign vested with the right of preemption over that area now claimed by the Oneidas. *See, e.g., Oneida II*, 414 U.S. at 670; *Johnson v. M'Intosh*, 21 U.S. 543, 584 (1823).

In the 1786 Treaty of Hartford (also called the Hartford Compact), New York and Massachusetts settled an early dispute over territory and

*(Footnote continued on next page)*



Oneidas'] lands" when the treaty was made. *See, e.g., Mitchel v. United States*, 34 U.S. 711, 746 (1835) (Indians may abandon, cede or sell their right to possess and occupy their lands, rendering their right extinct and disencumbering the land); *M'Intosh*, 21 U.S. at 588 ("All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."). The text does not support the Second Circuit's generous interpretation that the Oneidas' retained aboriginal title to the land "reserved" for their use. Rather, the 1788 Treaty unambiguously extinguished the Oneidas' aboriginal rights to their entire ancient domain in the first article, while granting them in the next article a state reservation created and defined by New York law.

Early authorities confirm this interpretation. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent),[7] described the treaty as follows:

> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ***ceding the whole*** of their vast territory to the people of this State, and ***accepting a retrocession of a part***, upon restricted terms, and with permission only to

*(Footnote continued from previous page)*
jurisdiction. This treaty confirmed that New York held the rights of "the government, sovereignty and jurisdiction" over the lands within its boundaries, but that Massachusetts owned the right of preemption from the Indians to certain land in western New York (in Seneca territory). *See* 1786 Treaty of Hartford, Arts. I & II (appended hereto at A15-A22).

[7] Chancellor Kent (with the likes of Chief Justices Jay and Marshall) is commonly regarded as a founding father of American jurisprudence. Oliver Wendell Holmes, Jr., in his 1873 Preface to the twelfth edition of *Kent's Commentaries on American Law*, noted that "[t]he great weight attaching to any opinion of Chancellor Kent has been deemed a sufficient reason for not attempting any alteration in his text or notes."

> lease certain parts for a term not exceeding twenty-one years.

*Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (emphasis supplied). Because the 1788 Treaty was a ***New York State*** treaty – and its construction is a question of ***state*** law – the lower courts should have deferred to the construction indicated by *Goodell*. *See, e.g., Bush v. Palm Beach Co. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("As a general rule, this Court defers to a state court's interpretation of a state statute.").

Eight years later, Chief Justice Marshall, apparently mindful of *Goodell*, noted that "some tribes" made pre-Constitution treaties with New York State "by which they ***ceded all their lands*** to that state, ***taking back*** a limited grant to themselves, in which they admit their dependence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (emphasis added). Although Chief Justice Marshall does not specifically identify the Oneidas, he almost certainly had the 1788 Treaty of Fort Schuyler in mind (as well as similar treaties with the Onondaga and Cayuga tribes) as the language of the treaty matches his description in *Cherokee Nation*.

Finally, identical language in a 1789 treaty between New York and the Cayuga Indians was construed in accordance with *Cherokee Nation* and *Goodell* by a panel of arbiters that included Roscoe Pound, Dean of Harvard Law School. At issue was a claim by Great Britain, on behalf of the Cayuga Indians in Canada, against the United States for annuities. *See* 20 Am. J. Int'l Law 574-594 (1926). The panel found that the Cayugas' aboriginal title to the land had been extinguished, and the lands ceded to New York. *Id.* at 590. Citing *Cherokee Nation*, the panel wrote, "[w]e think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession." *Id.*

In short, the plain language of the treaty, as interpreted by early authorities, compels the conclusion that the Oneidas



ceded "all their lands" to New York – including the parcels at issue in this case – thereby extinguishing their aboriginal title, and accepted a limited grant from New York. The Second Circuit erred by construing the 1788 Treaty of Fort Schuyler as preserving aboriginal title in the retroceded portion of the Oneidas' lands.

b. <u>The 1794 Treaty of Canandaigua Between the United States and the Six Nations</u>

Proceeding from the invalid assumption that the Oneidas retained aboriginal title to a portion of their ancestral lands, the Second Circuit compounded its error by failing to interpret the 1794 Treaty of Canandaigua, 7 Stat. 44, in accordance with *Minnesota* and concluding that it divested the State of its property and created a federal reservation.[8] 337 F.3d at 156. The provisions of the 1794 Treaty, read in historical context, show that no federal reservation was created for the Oneidas. Indeed, the Second Circuit's interpretation of the treaty renders it an illegal, uncompensated taking of state property in violation of the Fifth Amendment of the Constitution of the United States. *See, e.g., Seneca Nation*, 206 F. Supp. 2d at 533-34.

In Article II of the 1794 Treaty, the United States merely "***acknowledge[d]*** the lands reserved to the Oneida, Onondaga and Cayuga Nations, ***in their respective treaties with the state of New York***, and called their reservations, to be their property. . . ." (emphasis added). In addition, the United States asserted that ***it*** would "never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Nothing in the quoted language, or any other article, shows that the treaty's purpose was to divest New York of its interest in the land "with such certainty as to

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[8] Significantly, the State of New York was not a party to the 1794 Treaty of Canandaigua.

put it beyond reasonable question." *Minnesota*, 270 U.S. at 209; *Oneida Indian Nation,* 860 F.2d at 1163-64. This interpretation is consistent with the view expressed by U.S. Attorney General William Wirt that the Treaty of Canandaigua had no effect on the rights of ***New York*** *vis-a-vis* the Oneidas:

> [T]he legal titles of the States of New York and Massachusetts, and of the grantees under them . . . ***are not divested, or in any manner impaired*** by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the pre-existing rights of the Indians in any manner enlarged by that treaty.

Op. Att'y Gen. William Wirt (March 26, 1819) (appended hereto at A23-A28) (emphasis supplied).

The absence of any purpose or intent to create a federal reservation for the Oneidas is confirmed by the treaty's context. As explained below, history reveals that the Seneca nation was the primary reason for – and intended beneficiary of – the 1794 Treaty, not the other tribes of the Six Nations, including the Oneidas. *See Seneca Nation*, 206 F. Supp. 2d at 487. In 1782, New York agreed to cede to the United States its claim to western lands (present-day Ohio and the Erie Triangle). *See id.* at 473. Later, pursuant to the 1784 Treaty of Fort Stanwix, the United States obtained from the Six Nations a release of their claims to these western lands, and, in 1792, patented to Pennsylvania that portion lying west of New York known as the Erie Triangle, in which, among the Six Nations, only the Seneca tribe had an interest. *Id.* at 478-80, 483; William N. Fenton, *The Great Law and the Longhouse* at 646 (1998) (appended hereto at A29-A35). The 1784 Treaty of Fort Stanwix, however, proved over the next decade to be the source of much discontent among the Senecas. *Seneca Nation*, 206 F. Supp. 2d at 480-86. By 1794, Pennsylvania was threatening to force the Senecas out of the Erie Triangle, *see* Fenton, *supra,* at 646-50, and rumors



circulated that the Senecas (and possibly other Iroquois tribes) might join the active warfare between the western Indians and the United States. *Seneca Nation*, 206 F. Supp. 2d at 486. The United States therefore renewed treaty negotiations at Canandaigua. *Id.* at 486-87.

The primary purposes of the 1794 Treaty of Canandaigua were to obtain an express renunciation of rights in the Erie Triangle and reconfirm peace and friendship between the United States and the Six Nations, in particular the Senecas. *Id.* at 490 (*quoting* Letter from Timothy Pickering to Secretary of War Henry Knox of November 12, 1794). Prominently absent from the historical record is any indication of a federal purpose to take New York property and establish "recognized title" in the Oneidas (or other Iroquois nations).

In order to accomplish his mission, Pickering (the federal commissioner to the 1794 Treaty) acknowledged the boundaries of the Seneca nation land in the westernmost part of New York, abutting the Erie Triangle. Pickering baldly stated to Secretary Knox, when transmitting the Treaty, "[y]et not a foot of land has been given up which by the cession then made the U. States had a right to hold: all that I have relinquished falling within the pre-emption right of Massachusetts, and lying within the State of New York." *Id.* In a subsequent letter to Secretary Knox, Pickering confessed "that the United States had no right to the lands which I relinquished" in the 1794 Treaty, and stated, "I felt myself embarrassed . . . by presenting an idea of something very valuable, while, in fact the subject of the relinquishment was a shadow." *Id.* at 492 (*quoting* Letter from Pickering to Secretary Knox of December 26, 1794). He also recognized that the land in question lay "within the jurisdiction of New York," and that "no purchase or sale of lands made of or with the Indians within the limits of that State, could be binding . . . unless made . . . with the consent of the legislature of that State." *Id.* at 491-92. Although Pickering was

speaking of the Senecas, the real-party-in-interest to the 1794 Treaty, *id. at* 487, his understanding certainly applied equally to the Oneidas' state reservation in the center of New York, hundreds of miles east of the Seneca's territory.

In fact, the Oneidas previously took the position that the 1794 Treaty of Canandaigua applied only to lands ceded by New York in 1782 to the United States, and not to lands within the state. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1096-97 (2d Cir. 1982) ("The Oneidas . . . contend . . . that in any event the Treaty of Canandaigua, which was the last in a series aimed at obtaining Indian cession of Ohio Valley lands to the United States, applies only to the territory that had been in dispute, namely Ohio territorial lands outside the boundaries of the states, not Oneida land in New York."). Similarly, the United States argued in proceedings before the Indian Claims Commission that the Treaty of Canandaigua did not divest New York of its rights or enlarge the rights of the Indians. (Br. of United States in Supp. of Mot. to Consolidate for Summ. J. at 39-53 (appended hereto at A36-A49)).

By failing to apply the *Minnesota* rule of treaty construction and disregarding the historical context, the Second Circuit erred in construing the 1794 Treaty of Canandaigua to effect an illegal, uncompensated taking of New York's property for the benefit of a nominal party-in-interest that, in the past, has disclaimed that interpretation.

2. The Indian Trade and Intercourse Act Does Not Apply To The Properties At Issue.

The Second Circuit further erred by concluding that the Indian Trade and Intercourse Act of 1802, 2 Stat. 139, applied to the properties at issue and operated to preserve the Oneidas' "unextinguished" Indian title. 337 F.3d at 146-47, 157-58. As explained above, Indian title in the parcels at issue was extinguished in 1788, when the Oneidas ceded and granted all their lands to New York and took back a limited property interest. Subsequent conveyances by the Oneidas of



their state reservation to the State, or with the State's approval, are not prohibited by the Indian Trade and Intercourse Act of 1802, or other iterations of the enactment ("ITIA"), because they lie outside its intended reach. *See Bates v. Clark*, 95 U.S. 204, 208 (1877) ("The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer."); *American Fur Co. v. United States*, 27 U.S. 358, 369 (1829).[9]

Although the Second Circuit in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), distinguished *Bates* and *American Fur* and concluded that ITIA was not geographically limited as to land conveyances, *id.* at 627, the Counties submit that this reading is not justified as applied to the present parcels and is inconsistent with the decisions of this Court. It is also contrary to the understanding of early jurists. Before addressing these authorities, we note that then-Justice Rehnquist believed the petition for certiorari in *Mohegan* should have been granted so this Court could decide the scope and applicability of ITIA. *Id.*, 452 U.S. at 971. Over time, the need for review by this Court has become even more clear.

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[9] In addition to *Bates* and *American Fur*, this Court's dicta in *Seneca Nation v. Christy*, 162 U.S. 283 (1896), supports the view that ITIA did not apply to reservation land under the jurisdiction of New York State. In *Oneida I*, the Court cited *Christy* for the proposition that the original 13 states held the right of preemption, but noted that "this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida I*, 414 U.S. at 670, n.6. Based on the allegations, the Court allowed a claim under ITIA, "which put into statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States." *Id.* at 678. In the present litigation, however, it is clear that the Oneidas' Indian title to their lands was extinguished in 1788 before the Constitution became effective and before ITIA was enacted.

In an opinion involving Indian land claims in Florida, this Court suggested that some states continued to have the authority to convey Indian lands, notwithstanding ITIA:

> Grants made by the Indians at public councils ~~have~~ since been made directly to the purchasers or to the state in which the land lies, in trust for them, or with directions to convey to them, ***of which there are many instances of large tracts so sold and held, especially in New York***.
>
> It was a universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states after the revolution ***and yet continues in those where the right to the ultimate fee is owned by the states*** or their grantees.

*Mitchel,* 34 U.S. at 748 (emphasis added).

Likewise, in *New Jersey v. Wilson*, 11 U.S. 164 (1812), this Court made no mention of ITIA when discussing an 1803 conveyance to private parties by the Delaware Indians of their interest in a tract of land in New Jersey. Invalidating a New Jersey enactment that attempted to revoke the tax exempt status of the tract conveyed, the Court stated:

> It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege [tax exempt status] as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians.



*Id.* at 167. There is no indication that this Court considered the sale void for violating ITIA.

Attorney General William Wirt observed in 1819 that the states, including New York, stood in "precisely the same ground towards the Indians which the British King occupied" and "[a]s to the right of sale, the States of New York and Massachusetts, representing the sovereignty of the Crown in this respect, have regulated the manner in which it shall take place . . . ." Op. Att'y Gen. William Wirt (March 26, 1819).[10] The United States reiterated this position before the Indian Claims Commission in 1955, with the added gloss that the 1794 Treaty of Canandaigua "was an acknowledgement of the then well-known fact that" New York had the right to purchase the Indian lands, and that "the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales . . . ." (Br. of United States in Supp. of Mot. to Consolidate for Summ. J., *supra*, at 47).

Chancellor Kent, in his influential *Commentaries on American Law* ("*Kent's Commentaries*"), observed that "the several local governments, before and since our Revolution, never regarded the Indian nations within their territorial

[10] A June 16, 1795 opinion by Attorney General Bradford is sometimes cited as authority for the proposition that ITIA applied to New York. *See, e.g., Oneida Indian Nation of New York*, 434 F. Supp. at 534. Bradford himself, however, qualified his opinion, noting that "the documents submitted to the Attorney General" did not disclose "circumstances of the case under consideration to take it out of the general prohibition of [ITIA]." Op. Att'y Gen. William Bradford (June 16, 1975) (appended hereto at A50-A51). It is unclear what documents Bradford considered beyond the statute and the treaties between New York and the Oneidas, Cayugas, and Onondagas. In any event, Bradford's opinion (insofar as the Oneidas are concerned) is founded upon the erroneous assumption that the 1788 Treaty of Fort Schuyler failed to extinguish Indian title. *Id.*

domains as subjects," but nonetheless, "asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase." 3 *Kent's Commentaries* 384-85 (14th ed. 1896). Oliver Wendell Holmes, Jr., who edited the twelfth edition of *Kent's Commentaries* early in his career, also apparently believed the ITIA did not apply to Oneida land sales:

> So the Oneida Indians, owning lands in the counties of Oneida and Madison, were enabled, by the act of April 18, 1843, c. 185, to hold lands in severalty, and to sell and convey the same, under the care of a superintendent on the part of the state.

2 *Kent's Commentaries* 73 n.(a). There is no mention in *Kent's Commentaries* that any of the numerous purchases by New York were thought to violate ITIA.

3. It Would Be a Violation of the Tenth Amendment of the Constitution of United States to Deprive New York State of Jurisdiction over Its Own Territory

As discussed above, New York acquired all the Oneidas' land, including the parcels at issue, by virtue of the 1788 Treaty of Fort Schuyler. Although that treaty created a state reservation for the Oneidas, the land was never converted to a federal reservation or otherwise taken by the United States.

The Second Circuit takes the position that New York State does not hold an interest in the reserved property because, "[a]ny rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution." 337 F.3d at 146 (quotations omitted). To the extent that the Second Circuit's opinion affects ***New York State*** lands (not unextinguished aboriginal title), it is in error and violates the concept of State sovereignty preserved by the Tenth Amendment to the Constitution of the United States.



In *Alden v. Maine*, 527 U.S. 706 (1999), this Court recently explained that "[a]lthough the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Id.* at 713 (citation omitted). The Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

*Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (*quoting* The Federalist No. 45, at 292-293 (J. Madison) (C. Rossiter ed., 1961)). Madison further explained that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States,* 521 U.S. 898, 918 (1997) (*quoting* The Federalist No. 39 at 245 (J. Madison)).

An important component of the concept of State sovereignty is that "a State has plenary powers 'over its own territory. . . .'" *Northern Sec. Co. v. United States*, 193 U.S. 197, 347 (1904) (citation omitted). As discussed above, the 1788 Treaty of Fort Schuyler ceded all Oneida land to New York, which already exercised jurisdiction over them. New York's rights were not divested by the 1794 Treaty of Canandaigua, which merely acknowledged that the Oneida, Cayuga and Onondaga lands had been reserved in state

treaties and that the United States would never claim them. Moreover, New York's property interest could not have been divested by ITIA, as New York State had exercised its sovereign right to extinguish aboriginal title in 1788. Accordingly, under the Constitution and specifically under the concept of State sovereignty made explicit by the Tenth Amendment, the United States cannot deprive New York of jurisdiction over its own territory.

## CONCLUSION

For the reasons stated herein, as well as those stated by the City of Sherrill and the State of New York, the Court should grant the Petition for Certiorari.

Respectfully submitted,

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Dated: January 13, 2004



**03-855**

**SUPREME COURT OF THE UNITED STATES**

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, AND IVA ROGERS,

Respondents.

# APPENDIX

Excerpt from: *Brief for United States as Amicus Curiae* (Supreme Court Nos. 83-1065, 1240, Oct. Terms 1984)..... A1-A2

*Press Release of Stockbridge Valley Central School District* (January 8, 2004) ..... A3-A5

Elizabeth Rinaldo, *SVCS faces budget cuts in wake of grant loss,* Oneida Daily Dispatch (January 12, 2004)..... A6-A9

*1788 Treaty of Fort Schuyler Between New York State and the Oneida Indians*..... A10-A14

*1786 Treaty (or Compact) of Hartford Between New York States and the Commonwealth of Massachusetts*..... A15-A22

*Opinion of Attorney General William Wirt* (March 26, 1819) ..... A23-A28

Excerpt from: William N. Fenton, *The Great Law and the Longhouse* (1998) ..... A29-A35

Excerpt from: *Brief in Support of United States' Motion to Consolidate for Summary Judgement* (I.C.C. Nos. 300A, 301, 342, 343, 344, 368, July 15, 1955)..... A36-A49

*Opinion of Attorney General William Bradford* (June 16, 1795)..... A50-A51

Excerpt from: *Brief for United States as Amicus Curiae*
(Supreme Court Nos. 83-1065, 1240, Oct. Terms 1984)

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* * * * *

B. A question remains whether equitable considerations should limit the relief available to the present-day Onezida groups. The Counties interposed such an objection in district court (Supp. Pet. App. 271-301), but they do not appear to have presented it on appeal and they have not presented it for review by this Court. Some consideration of the question is nevertheless appropriate, in our view, in order to illuminate the context in which the issues that are before the Court might be resolved in future cases.

Here, as in *Board of Commissioners v. United States*, 308 U.S. 343, 349 (1939) (a suit to recover taxes improperly levied on Indian land), Congress has not specifically provided for "the nature and extent of relief in case loss is suffered"—in this case, the loss resulting from a void conveyance or wrongful occupation of Indian land. Congress instead has "left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature" (*id.* at 351). Even in [34] suits brought by the United States, then, Congress may be thought to have left the courts free, when fashioning a remedy, to "take into account appropriate considerations of 'public convenience'" (*ibid.*); to give "due regard for local institutions and local interests" (*ibid.*); and to weigh such factors as "unexcused delay," "considerations of fairness," and the relative innocence of the defendant (*id.* at 352-353). But there is no need to consider at this time whether or to what extent these principles apply in suits brought by the Untied States to set aside a void conveyance of tribal land. This is so because, in our view, such principles plainly *do* apply where, as here, the United States has declined to sue to vindicate an abiding sovereign interest in

enforcing the prohibitions against unauthorized purchases of tribal land[26] and the tribe itself has sued to repudiate its own prior transaction and asserts its own possessory rights. Cf. *United States v. Hellard*, 322 U.S. 363, 366 (1944).

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[26] The Trade and Intercourse Acts can be said to have established a guardian-ward relationship between the United States and the Indians in a moral or political sense, growing out of the intended federal oversight of Indian land transactions. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) at 70. But we do not believe that those Acts were understood to establish a "trust" relationship in a legal sense that would *compel* the United States to sue to set aside any conveyance made without the approval of the federal government. Compare *United States* v. *Mitchell*, 445 U.S. 535, 540-546 (1980). Cf. *Nevada v. United States*, slip op. 16-17; but cf. *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975).



*Press Release of Stockbridge Valley Central School District*
(January 8, 2004)

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PRESS RELEASE

January 8, 2004

The Superintendent of Stockbridge Valley School, Dr. Randy C. Richards, today revealed his belief that it was the intention of the Oneida Nation to revoke the $120,000 funding pledged to the School District by the Oneida Indian Nation.

Silver Covenant Funds are monetary awards made by the Nation to the various school districts in the area where Nation land purchases have been made, and resulting in diminished tax revenues available to the districts.

In a press release dated October 11, 1996, describing the Silver Covenant Grants, the Nations said that it created the Education Grants program last January because of its deep belief that its children and the children of its neighbors should receive the highest quality education possible. To assist Oneida Members and the local communities in achieving this goal, the Nation established these voluntary grants, which each school district uses completely at its own discretion, to provide financial aid directly to schools in Oneida and Madison Counties."

Superintendent Richards said the revocation of the funding appears to have arisen from an intra-tribal dispute that resulted in demands by the Nation's representative, Chuck Fougnier, for the firing of a Native American school employee. "This same demand has been made of prior Superintendents in the past who have found no grounds for discipline or discharge of the employee." According to

Superintendent Richards, the District has sought to address the concerns raised by Mr. Fougnier. However, these attempts have not borne fruit. "On December 23rd, I was told by Mr. Fougnier that he would not even meet with me to discuss this matter unless and until we discharged the employee," said Superintendent Richards.

The School Board met on December 29, 2003 to discuss the latest demand made by Mr. Fougnier on behalf of the Oneida Nation, and rejected it.

Stockbridge Valley School Board President, Michael Cot said that, "There is no basis in the law for the termination of an employee simply because a fund donor demands it. It would be improper for the School District to enmesh itself in this dispute. I also feel that it is inappropriate and unfair for the Nation to use its financial pledge to this community to force the District to discharge an employee without just cause in order to sanction that individual for an intra-tribal disagreement. This dispute is a real distraction from the District's educational mission and raises the potential for damage to our school operations."

Superintendent Richards said that the proposed revocation of this funding may have a dramatic impact on the ability of the school to fund programs, and would likely result in significant cuts. He noted that this not the first time the District has had to deal with dramatic revenue loss and, should the Nation choose to withhold the funds, the school would attempt to weather the storm as it has in the past.

The Board and the administration are now confronted with many difficult choices in the face of the finding loss. Dr. Richards indicated that, even if the promised finds are restored, the school would no longer be able to consider the funds as part of the school's revenue stream as it had in the past. "I am advised that last year we were short $10,000 of anticipated income when the Nation decided that it would



reduce Silver Covenant Funding by that amount and instead use that money to fund a scholarship for two students at the school. We were assured at that time that the $10,000. would be restored to the Covenant, but it was not. "Since they were using the money to fund the scholarships, it would seem at this point that those scholarships are gone as well."

Dr. Richards indicated that, on January 7th, the district received a letter from Dr. Peter Golia, Special Assistant to the Nation Representative. Which indicated that the Nation had concerns over the Districts understanding of the relationship among the nation, school, and the "voluntary" education grants. According to Superintendent Richards, Dr. Golia's letter did not address the earlier demands made by nations representative Chuck Fougnier for the firing of a native American school employee. I was hopeful "that we could develop a dialog with Dr. Golia to address and resolve those other concerns, and I immediately wrote to Dr. Goliato set up a meeting, said Dr. Richards." However, my staff and I have fried calling Dr. Golia on five occasions since then and have been told that Dr. Golia is busy said" Dr. Richards.

Oot and Richards indicated that the Board hoped that the rift between the School District and the Nation could be quickly healed. "We have demonstrated ourselves to be good neighbors to the Nation. The children of the Oneida have been educated here in Stockbridge Valley for generations, and more recently, access to the school has been extended to Oneida children who live outside of the district. The Silver Covenant Funds benefit these and all the children of the District."

Excerpt from: *Oneida Daily Dispatch*
(January 12, 2004)

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SVCS faces budget cuts in wake of grant loss
Board will meet Tuesday to discuss budget changes

By Elizabeth Rinaldo
Dispatch Staff Writer

MUNNSVILLE - Stockbridge Valley Central Schools Superintendent Randy Richards said the district will have to make budget cuts, which could affect programs or personnel, because the Oneida Indian Nation has revoked a $120,000 Silver Covenant grant.

Richards made the announcement at a press conference Saturday morning, where he also addressed concerns of community members.

"The impact is pretty severe," Richards said of losing the money. "But I urge the community not to panic. We will get through this."

Richards told the community he has tried several times to arrange a meeting with the Nation to resolve the conflict, with no success.

"When I was told we wouldn't be receiving the money, I asked for a meeting," Richards said. "I was told there would be nor more meetings."

Richards also said he has called the Nation "every day this week," but has gotten no response.

The Nation is refusing to provide the district with the Covenant, which the Nation describes as a "friendship gift," unless the district fires Monica Antone, a teacher's aide, who



runs a Native American program at the school. Antone mentors Native American students, working with them both academically, as well as teaching Native American culture, lessons in nature, and taking them on field trips.

The program, formally known as Title VII, is a federally funded program; Stockbridge Valley is the only school in the area that receives the money and has been participating in the program since the mid-90s.

Richards said he was told by the Nation not to apply for the federal funds any longer, but the Oneida Indian Nation is in no way associated with the implementation of the federal program.

"We maximize an opportunity for federal money," Richards said. "And we educate Native American students in our school. It would be irresponsible not to apply for the money."

About 60 students at Stockbridge Valley are Native Americans; more than 40 of them participate in the program.

The Nation says Antone brings her conflicts with the Nation into the school and the classroom, including her opposition to Nation leader Ray Halbritter.

Richards said both he and two previous administrators investigated those claims, finding them unsubstantiated.

Furthermore, the Nation says parents have complained to the Oneida Men's Council and Clan Mothers about Antone and several occasions, although no parents brought that concern to the school board.

"The first we heard about this was from the Nation," Richards said.

He said no students have brought any concerns about Antone to him or the board either.

The district also had the program reviewed by a professor at SUNY Buffalo who issued a report, which included suggestions of greater involvement with the Nation. The district forwarded that report to the education department at the Nation in October, asking for suggestions and a possible cooperation. He said the Nation has not responded to that request, or commented on the report.

Richards said the Nation told him either to fire Antone, or lose the Silver Covenant.

Antone is a tenured employee at the school. In order to be granted tenure, an employee must have at least three years of satisfactory service to the district, as well as positive evaluations. Once an employee has tenure, New York State Education Law mandates a process that must be completed in order to terminate that employee. Richards said, in this case, that is not necessary.

"This person does a good job for us," he said. "I'm open to solutions, but firing her is not one of them."

Richards said he tried to explain to the Nation that it would violate federal law if he fired Antone. It didn't seem to matter.

They were unflinching," he said. "They were firm in their demands that she be removed."

The board of education will hold an emergency meeting Tuesday at 6:30 in the high school library to discuss the next steps for the district. Richards said any decisions about budget cuts will be made at that meeting, which is open to the public.



"There will not arbitrarily be $120,000 of cuts across the board," Richards said. "We've had to deal with budget cuts before. We provide a good education to our students and we've always done it economically. We will get through."

Richards said there was some reserve money that will help with the loss, and he has also contacted local legislators to see if the state can help replace some of $120,000.

Stockbridge Valley is the only school district losing the Silver Covenant funds and the Nation has said that the scholarship portion of the program will continue.

Richards is firm in his belief that no matter what happens, the school will not sacrifice Antone or the program to the demands of the Nation.

"It's tough to do the right thing," he said, "but this is the right thing."

For her part, Antone is appreciative of the backing she's received from the district.

"They all support me highly," she said. "I still can't believe they've (the Nation) tried to put their political motives into the school, where the kids are trying to learn."

"They are taking the money away from the kids," Antone said.

*1788 Treaty of Fort Schuyler Between New York State and the Oneida Indians*

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At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas – it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

*First*, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

*Secondly*, Of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas



shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and furtner notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the

Stockbridge indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

*Thirdly,* In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the



lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

*Fourthly*, The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto intercheangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE

KANAGHGWEYA
PETER OTSIQUETTE
THAGHNIYONGO
THONIGWEAGHSHALE
TEHEAND 'YAKHON
OGISTALALE *alias* HANYURRY
OTSETOGON
TEYOHAGWEANDA
ONEYANHA *alias* BEECH TREE
THAGHNEGHTOLIS *alias* HENDRICK
S' HONOUGHLEYO *alias* ANTGONY
THAGTAGHGUISEA
HANAGHSALILGH
GAGHSAWEDA
TYAGHSWEANGALOLIS *alias* DOMINE PETER
JOHEGHSLISHEA *alias* DANIEL
THANIGEANDAGAYON
ALAWISTONIS *alias* BLACKSMITH
KEANYAKO *alias* DAVID
KAKIKTOTON
SAGOYONTHA
HANNAH SODOLK
TEHOUGHNIHALK HANWAGALET
KASKONGHGWEA KANWAGALET
HONONWAYELE
SKENONDONGH
GEORGE CLINTON
WM. FLOYD
EZRA L'HOMMEDIEU
RICHARD VARICK
SAMUEL JONES
EGBERT BENSON
PETER GANSEVOORT, JUNR.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)





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To all to whom these presents shall come, the underwritten John Lowell, James Sullivan, Theophilus Parsons and Rufus King, agents or commissioners appointed by the Commonwealth of Massachusetts, of the one part, and the underwritten James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith and Egbert Benson, six of the agents or commissioners appointed by the State of New York, of the other part, send greeting:

WHEREAS, The Commonwealth of Massachusetts did heretofore present a petition to the United States, in Congress assembled, thereby among other things stating that all that territory which in the said petition is described as "All that part of New England in America which lieth and extendeth between a great river called Merrimac, and a certain other river, Charles river, being the bottom of a bay then called Massachusetts bay, and also those lands lying within three English miles to the southward of the southernmost part of the said bay, and extending thence northward in latitude to the northward of every part of the said river Merrimac, and in breadth of latitude aforesaid, extending through all the main-land in longitude westwardly to the southern ocean," was the just and proper right of the said commonwealth; and further stating that the State of New York had set up a claim to some part of the land before mentioned; the said commonwealth did therefore by the said petition solemnly request of the United States in Congress that commissioners might be appointed for inquiring into and determining upon the claim aforesaid of the Legislature of the said commonwealth, and that such other proceedings respecting the premises might be had as are by the federal government of the said United States in such case made and provided, as by the said petition filed among the archives of the United States, reference being thereunto had may more fully appear; and

WHEREAS, The State of New York doth, in opposition to the said claim of the Commonwealth of Massachusetts, claim as the just and proper right of the said State, as well in respect of property as jurisdiction, all those lands, territories, bounded on the north by the parallel of latitude passing through the said point, place or boundary aforesaid of three miles to the northward of every point of the said river Merrimac, and bounded on the south by the parallel of latitude passing through the said point or place situate three miles south of the southernmost point on the said bay, called Massachusetts bay, bounded on the west by the limits between the United States and the King of Great Britain, by the line of cession from the State of New York to the United States, and bounded on the east by the line agreed on and established between the late colony of Massachusetts Bay and the late colony of New York, in the year 1773; and from the northern terminal of the said line, then bounded on the east by the western bank of the Connecticut river; and

WHEREAS, The State of New York, having been duly notified, did appear by their lawful agent to vindicate such their said right against the said claim of the said commonwealth, and proceedings were thereupon had in Congress pursuant to the Articles of Confederation, in order to the appointment of commissioners or judges to constitute a court for hearing and determining the said matters in question; and

WHEREAS, The said John Duane, James Sullivan, Theophilus Parsons and Rufus King were afterwards, by a certain commission under the seal of the said commonwealth, and bearing date the twenty-sixth day of April, in the ninth year of the independence of the United States, and made in pursuance of an act of the Legislature of the said commonwealth, passed the fourteenth day of March, in the eighth year of the independence of the United States, and of a resolution of the said Legislature, passed the eighteenth day of the said month of March, commissioned to be agents to



manage, conduct and prosecute the claims of the said commonwealth to the lands described in the said petition; and

WHEREAS, Afterwards and pending such proceedings in Congress, the Legislature of the Commonwealth of Massachusetts did, by an act entitled "An act empowering the agents appointed by this government to defend the territory on the west side of Hudson river against the claims of the State of New York, to settle the controversy relative thereto, otherwise than by a federal court if they shall judge it expedient," enact that the major part of said agents or commissioners shall be fully authorized and empowered to agree with the agents or commissioners of the State of New York and settle the controversy respecting the territory aforesaid by a federal court as appointed by virtue of the confederation or otherwise, in such way and manner as they should judge would comport with justice and the interest of the said Commonwealth, and the Legislature of the State of New York did by an act entitled "An act supplementary to the act entitled 'An act to appoint agents or commissioners for vindicating the right and jurisdiction of this State against the claims of the Commonwealth of Massachusetts, pursuant to the articles of confederation and perpetual union of the United States,'" among other things enact that it should be lawful for the said James Duane, Robert R. Livingston, Egbert Benson, John Haring, Melancton Smith and Robert Yates, and also John Lansing, Jr., or any five or more of them to settle said controversy between the said State of New York and the said Commonwealth of Massachusetts, otherwise than by the said federal court in such manner as they should judge most conducive to the interest of the said State, as by the said commission and the said several acts, relation being thereunto had, may appear.

Now, therefore, know ye, that the underwritten commissioners on the part of the Commonwealth of Massachusetts and State of New York respectively, having by mutual consent assembled at the city of Hartford, in the State

of Connecticut, on the thirtieth day of November last, in order to the due execution of their respective trusts, and having duly exchanged and considered their respective powers and declared the same legal and sufficient after several conferences, and to the end that all interfering claims and controversies between the said Commonwealth of Massachusetts and the State of New York, as well in respect of jurisdiction as property, may be finally settled and extinguished, and peace and harmony forever established between them on the most solid foundations have agreed, and by these presents do mutually for and in behalf of the said Commonwealth of Massachusetts and the said State of New York by whom, respectively, they, the said commissioners, have been so appointed and authorized as aforesaid, agree to the mutual cession, grant, release and other provisions following, that is to say:

*First*. The Commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of New York, forever, all the claim, right and title, which the Commonwealth of Massachusetts hath to the government, sovereignty and jurisdiction of the lands and territories so claimed by the State of New York, as hereinbefore stated and particularly described.

*Secondly*. The State of New York doth hereby cede, grant, release and confirm to the said Commonwealth of Massachusetts, and to the use of the Commonwealth, their grantees and the heirs and assigns of such grantees forever, the right of preemption of the soil from the native Indians, and all their estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the State of New York hath of, in or to 230,400 acres, to be located by the Commonwealth of Massachusetts, and to be situate to the northward and adjoining to the lands granted respectively to Daniel Cox and Robert Lettice Hasper, and their respective associates, and between the rivers Owego and Chenango, and also of, in or to all the lands and territories



within the following limits and bounds, that is to say: Beginning in the north boundary line of the State of Pennsylvania, in the parallel of forty-two degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the State of Pennsylvania, on the Delaware river, as the said boundary line hath been run, and marked by the commissioners appointed by the States of Pennsylvania and New York respectively, and from the said point or place of beginning running on a due meridian north to the boundary line between the United States of America and the King of Great Britain; thence westerly and southerly along the said boundary line to a meridian which will pass one mile due east from the northern termination of the strait or waters between Lake Ontario and Lake Erie; thence south along the said meridian to the south shore of Lake Ontario; thence on the eastern side of the said strait by a line always one mile distant from and parallel to the said strait to Lake Erie; thence due west to the boundary line between the United States and the Kind of Great Britain; thence along the said boundary line until it meets with the line of cession from the State of New York to the United States; thence along the said line of cession to the northwest corner of the State of Pennsylvania; and thence east along the northern boundary line of the State of Pennsylvania to the said place of beginning, and which said lands and territories so ceded, granted, released and confirmed are part of the lands and territories described in the said petition.

*Thirdly*. The Commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of New York and to the use of the State of New York, their grantees, and the heirs and assigns of such grantees forever, the right of preemption of the soil from the native Indians and all other the estate, right, title and property which the Commonwealth of Massachusetts hath, of, in, or to the residue of the lands and territories so claimed by the State of New York as hereinbefore stated and particularly specified.

*Fourthly*. That the lands so ceded, granted, released and confirmed to the Commonwealth of Massachusetts, or such part thereof as shall from time to time be and remain the property of the Commonwealth of Massachusetts, shall during the time that the same shall be and remain such property, be free and exempt from all taxes whatsoever, and that no general or State tax shall be charged on or collected from the lands hereinafter to be granted by the Commonwealth of Massachusetts, or on the occupants or proprietors of such lands, until fifteen years after such confirmation as is hereinafter mentioned of such grant shall have expired, but that the lands to be granted and the occupants thereof shall, during the said period, be subject to town and county charges or taxes, only from deeds that this exemption from general or State taxes shall not be construed to extend such duties, excises or imposts to which the other inhabitants of the State of New York shall be subject and liable.

*Fifthly*. That no rents or services shall be reserved in any grants to be made of the said lands by the Commonwealth of Massachusetts.

*Sixthly*. The inhabitants on the said lands and territories being citizens of any of the United States, and holding by grant from the Commonwealth of Massachusetts, shall be entitled to equal rights with the other citizens of the State of new York, and further that the citizens of the Commonwealth of Massachusetts shall from time to time, and at all times hereafter, have and enjoy the same and equal rights respecting the navigation and fishery on and in Lake Ontario and Lake Erie, and the waters communicating from one to the other of the said lakes, and respecting the roads and portages between the said lakes, as shall from time to time be had and enjoyed by the citizens of the State of New York. And the citizens of the Commonwealth of Massachusetts shall not be subject to any other regulations or greater tolls or duties to be made or imposed from time to time by the State



of New York, respecting the premises, than the citizens of the State of New York shall be subject to.

*Seventhly*. That no adverse possession of the said lands for any length of time shall be adjudged a disseizin of the Commonwealth of Massachusetts.

*Eighthly*. That the State of New York, so long as any part of the said lands shall be and remain the property of the Commonwealth of Massachusetts, shall not cede, relinquish or in any manner divest themselves of the government and jurisdiction of the said land, or any part thereof, without the consent of the Commonwealth of Massachusetts.

*Ninthly*. That the Commonwealth of Massachusetts may from time to time, by persons to be by them authorized for the purpose, hold treaties and conferences with the native Indians relative to the property of right of soil of the said lands and territories hereby ceded, granted, released and confirmed to the Commonwealth of Massachusetts, and with such armed force as they shall deem necessary for the more effectual holding such treaty or conference; and the Commonwealth of Massachusetts, within six months after such treaties shall respectively be made, shall cause copies thereof to be deposited in the office of the Secretary of the State of New York.

*Tenthly*. The Commonwealth of Massachusetts may grant the right of preemption of the whole or any part of the said lands and territories to any person or persons who by virtue of such grant shall have good right to extinguish by purchase the claims of the native Indians, providing, however, that no purchase from the native Indians by any such grantee or grantees shall be valid unless the same shall be made in the presence of and approved by a superintendent to be appointed for such purpose by the Commonwealth of Massachusetts, and having no interest in such purchase, and unless such

purchase shall be confirmed by the Commonwealth of Massachusetts.

*Eleventhly*. That the grantees of the said lands and territories under the Commonwealth of Massachusetts, shall within six months after the confirmation of their respective grants, cause such grants or the confirmation thereof or copies of such grants or confirmations, certified or exemplified under the seal of the Commonwealth of Massachusetts, to be deposited in the said office of Secretary of State of New York, to the end that the same be recorded there, and after the same shall have been so recorded, the grantees shall be entitled to receive again from the said Secretary their respective grants or confirmations or the copies thereof, whichever may have been so deposited, without any charge or fees of office whatsoever; and every grant or confirmation which shall not, or of which such copies shall not be so deposited shall be adjudged void.

In testimony whereof, the said John Lowell, James Sullivan, Theophilus Parsons and Rufus King for and in the name and behalf of the said Commonwealth of Massachusetts, and the said James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith and Egbert Benson for and in the name and on behalf of the said State of New York, have to these presence and a duplicate thereof, both intended interchangeably, set their hands and affixed their seals.

Done at the city of Hartford, aforesaid, the 16th day of December, in the year of our Lord 1786, and the eleventh year of the independence of the United States of America.





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To the first question I answer, that the legal titles of the States of New York and Massachusetts, and of the grantees under them, as settled and established by the convention of 1786, are not divated, or in any manner impaired, by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the pre-existing rights of the Indians in any manner enlarged by that treaty.

The convention of 1786 being an arrangement of compromise between the States of Massachusetts and New York, as to rights then existing in those States, could not be affected by a matter transacted between other parties, as the treaty of Canandaigua was; the latter being a convention between the United States and the Six Nations, neither of which parties was authorized to transfer or in any manner to modify the separate and pre-existing rights of those individual States.

The character of the Indian right to lands within the limits of the United States, or within those of the territories claimed by the sovereigns of Europe, has never been defined with precision, so far as I am informed. The Supreme Court has decided that a State may make a valid grant to pass the seizin of lands lying within its limits, although the Indian title to such lands has not been extinguished. A title of some sort is thus acknowledged to exist in the Indians, and such a title, too, as cannot be extinguished without their consent. It is a title, too, which, however narrow in other respects, is a title in fee simple, or, at least, a title of perpetual inheritance, because it will be admitted, on all hands, that neither the present occupants nor their heirs, so long as the nation subsists, can be rightfully driven from their possessions. Yet it is a fee without the right of alienation, (a legal anomaly), because the

Christian Sovereigns of Europe, who had the physical power to give the law on this subject, have said that, by virtue of the possession which they took of this country when held by barbarians, the right of domain vested in them respectively, and that there can be no valid grant but such as proceeds from the Crown.

It would be vain, at this time of day, to moralize on this subject. More confusion and more suffering would result from the attempt to draw back the question of Indian title to the fundamental principles of human right, than from the endeavor to settle it on its present basis, with all the precision in our power.

The States occupying, by the treaty of 1783 with Great Britain, precisely the same ground towards the Indians which the British King occupied, the Indian possessors of the soil cannot by any act of their prejudice the sovereign right of the State within which they dwell, any more than they could by such act formerly prejudice the right of the British Crown. The right of sovereignty and the right of soil being in the Crown, the Indian occupant could not alienate but with the sanction and by the grant of the Crown; the Indians having neither the right of sovereignty nor of soil, and not holding under a grant from the Crown, could be considered as keeping the possession by the acquiescence and at the will of the Crown. And the right on the part of the Indians, either to hold or to sell, being a right derived in legal contemplation from courtesy of the Crown merely, could be exercised in such way only as the Crown should appoint.

As to the right of sale, the States of New York and Massachusetts, representing the sovereignty of the Crown in this respect, have regulated the manner in which it shall take place, as stated in the case hereto annexed.

The use of the lands themselves is less definitely settled. A lease of the lands, being considered as an



alienation, has been declared invalid. A lease is an authority to cultivate the lands and reap the crops. This authority, it is conceded, the Indians have no right to give. How then do they acquire the right to alienate the natural productions of the soil, the timber growing on it? I incline to the opinion that the use of the lands permitted to the Indians is to be considered as personal to themselves; as intended for their subsistence, and looking to their personal occupation of it; and, although they have the right to cultivate and sell the crops, which are the production of their own labor, they have no more right to sell the standing timber, the natural production of the soil, as an article of traffic, than they have to sell the soil itself.

Lord Coke says that a grant of woods, or of woods growing, passes not merely the woods, but the land also. For this is not a right essential to the purpose of subsistence, for which alone, I presume, they are permitted to retain the possession. If they can sell any part of the standing timber, they may sell the whole by one contract; and the right to sell the timber, carrying with it the right to give the means to cut and carry away the timber, the Indians, according to this hypothesis, have the right to alienate the possession of the soil to the vendees of the timber, until the whole of it shall be cut and carried away. Does such an authority comport with that qualified right which prohibits the Indians from leasing the land for one year? Would it be permitted by the sovereign claiming the paramount right of the soil? If it would, of what value would the soil be, divested of its timber, to an immeasurable extent?

This restriction upon the Indian right may be at first revolting to us; but are not all the restrictions on their aboriginal rights of the same character? and is the restriction in question anything more than a consequence fairly deduced from the admitted restriction upon them, to alienate the lands by lease even for a single year?

I incline, therefore, to the opinion that, under the qualified right held by the Indians, they have no authority either to sell the land, or to make leases of it, or to sell the timber growing on the land; nor do I consider this opinion at all impugned by the course to which it is said the State of New York has sometimes resorted, to punish trespassers on the Indian lands. The Legislature of that State, for example, has, it is said, in some cases, directed actions of trespass to be brought by an officer, who is the guardian of the Indians, but the damages recovered are directed to be applied to the use of the Indians, and this has been considered as an acknowledgment that the right to the timber is in the Indians.

I do not perceive that this consequence necessarily follows from such a Legislative direction: for it may have been a gratuity or peace offering on the part of the Legislature; nor even if such a legislative provision is to be considered an admission that the Indians were entitled to the damages for the trespass on the timber, would it by any means follow that they had such a title to the timber itself as to have authorized the sale of it. They might have a right to insist that the timber should stand as cover for their game, as fuel for themselves, or to form enclosures for their fields. All this is perfectly compatible with that personal use of the lands which has been admitted, and to cut the timber would be a trespass against their right. Yet this right of property in the timber for *particular purposes* does not by any means carry with it the right to sell. Thus lessee for life or years on land has no property in the trees growing on the land. Even if the clause in the lease be without impeachment of waste, yet it gives him no property in the growing trees: yet if a stranger cut any of them down the lessee may maintain trespass; and his recovery shall be on account of his particular interest in the trees as for cropping and breaking his close, and perhaps for loss of shade, etc. (Esp. N., p. 384.) So that without such a property as would authorize him to cut and use the trees at pleasure, much less in sell them, such a tenant has nevertheless such an



interest in their remaining as they are as to authorize him to recover damages for cutting them down. Thus the special property which the Indians have in the timber may entitle them to the damages for cutting it down. Yet that general property which would authorize a sale of the timber cannot, it is conceived, be legally inferred from such a special property.

From this view of the subject, I am of opinion that those who occupy the lands in question, or cut the timber under contracts with the Seneca nation, act without authority.

Yet I do not think that the grantees of the soil under Massachusetts can maintain actions of trespass or waste against those unauthorized persons.

1. Not actions of trespass, because the plaintiff, in order to maintain such action, must prove that he was in actual possession at the time of the alleged trespass; such at least is the law of England, and such also, I understand to be the law of New York. (Campbell *vs.* Arnold, 1 John, 511, and Douglass *et al vs.* Valentine, 7 John, 273.)

2. Nor waste, because this is a remedy given (in the only instance approaching an analogy) to him who has the remainder or reversion of the inheritance after a particular estate for life or years in being. But the estate in being, of the Seneca nation, is not a particular estate for life or years. It is an estate (however limited in other respects) of perpetual inheritance; and there is no communion between the legal estate of the claimants under Massachusetts and that of the Indian proprietors; they are totally independent, and the relation, therefore, does not subsist between them which would authorize the Massachusetts grantees to institute waste either against the Indians or their agents.

The character of the Indian title is made an anomaly in our law, that I regret the shortness of the time which has been afforded me to consider these questions, and the constant

interruptions amid which I have had to form an opinion on them. The necessity of an immediate decision, however, leaves me no other course than to submit the opinion at once, crude as it may be.



Excerpt from: William N. Fenton, *The Great Law and the Longhouse* (1998)

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Congress had patented the Erie Triangle to Pennsylvania in 1792. This act intended to afford American traders an outlet on Lake Erie at Presque Isle. For two years the woods would be full of surveyors, whom the Indians regarded as a threat. In the autumn of 1793, after the unsuccessful peace mission to Detroit led by Pickering, Lincoln, and Randolph, a council at Buffalo Creek proposed Venango as the site of a general peace treaty to convene on 15 May 1794. Peace seemed possible, but between the fall hunt and spring planting, affairs took a turn, largely because of Dorchester's speech and Simcoe's strengthening of the forts. President Washington presented the matter to Congress with supporting documents, and he made representations to the British ambassador. Brant could not be counted on, and Cornplanter wavered from friendliness to near hostility.

But let us return to the council at Buffalo Creek in the autumn of 1793. Farmer's Brother delivered the word of the western confederates, speaking as if their words were his own. Both the British Indian superintendent, Colonel John Butler, and the United States Indian agent, General Israel Chapin, heard him. On inquiry they learned that the league between the Six Nations and the Shawnees had stood for "three lives," with the understanding that if either party were in distress, the other would come to its aid. The Shawnees now offered the Iroquois a place to come, bring their beds, and sit down. A Wyandot spoke through a large wampum belt, which pictured the Americans, the Six Nations in the middle, and themselves [647] at the far end, to express the Wyandots' sorrow that the American commissioners were gone before they could speak

to them. Brant arrived a day late to advance the Mohawk (British) position that claims to Indian lands were the persistent cause of wars with Indians; he insisted on some assurance on the boundary line issue.

These communications in Chapin's reports prompted Knox to issue invitations to the Indians in the president's name to treat at Venango, beyond British ears. Knox advised the western tribes to come by water to Presque Isle. Chapin delivered the invitation at a council held at Buffalo Creek in February 1794, and he attended again in April to hear the reply of the Six Nations. The president included the reports of these meetings among sundry papers that he laid before Congress. Several factors caused the delay between invitation and reply: the Six Nations' desire to retire and consider the matter privately in council at the Seneca village, their submitting the invitation to the British for scrutiny, and the hardening of the British attitude as reflected in Dorchester's speech. The boundary issue hung like a curtain between the parties. The Six Nations stalled for time on the pretext that some of the chiefs were afield.

By April, dark clouds hovered over the frontier from Canandaigua to Pittsburgh, and people quaked like the aspen before the gathering storm. A few strong individuals, both white and Indian, stand out like giant pines in the intervening forest. Chapin at Canandaigua and John Adlum, the Pennsylvania surveyor, heard the alarm but refused to believe that war would occur. Cornplanter and Red Jacket, leaders of opposite factions, prepared to withstand the storm. But it was the Onondaga Clear Sky whom the council chose to turn down the president's summons to Venango. Because of its importance, the council had considered the president's speech at length, but the sachems replied, "It is not now in our power to accept." After rehearsing their relations with the Americans during the decade since Fort Stanwix, Clear Sky stated: "In the absence of any pre-agreement on a boundary line, we cannot, at present, rise from our seats and attend your



council at Venango." He concluded by asserting the independence of both the Six Nations and the United States. They would put themselves under the protection of the Great Spirit. Although their patience might be worn, yet they wished for peace. Accordingly, they returned the invitation belt and the speech to Secretary Knox.

Unshaken, Chapin asserted that he did not believe that war would take place. He asked, Why do the Indians need be called out to forward the pretensions of Great Britain? They could rest assured that the president would not take up the tomahawk without warning them.

Canandaigua was an open town. Utica lay 112 miles east through unbroken forest, Buffalo some 100 miles west through oak openings. Chapin returned home to find the place in a flap. Townspeople urged erecting a blockhouse to shelter women and children should the Indians rise. Chapin opposed such evidence of fear lest it provoke a raid, but he did ask Knox to forward twelve hundred to fifteen hundred stand of arms and ammunition. Indians came and went daily without apparent unfriendly intention, although one story held that an Indian approached a white woman, circled the top of her head with his finger, and with a threatening look said, "Bime by [by-and-by] you." It was not in Chapin's official reports, but it was alleged that friendly sachems informed him that a council was set for September to determine whether settlements on the Genesee should be cut off. [648] Cornplanter assured Chapin that he would communicate the result by one of his swiftest runners. Should the runner bring bad news, Chapin thought there would be lead time for the women to reach Utica before war parties struck.

The council met, and when it reached a decision, Cornplanter, it was said, started a runner at daybreak with news for Chapin. Indian runners traveled in breechcloths and moccasins, carrying only parched corn and dried venison, and the frontier whites knew their gait as the "Indian lope" – a

long, swinging stride. Tension mounted while Chapin waited at home. As the sun sank behind Arsenal Hill, the runner came down Main Street. Chapin met him. "*The runner had made ninety miles upon the trail between the rising and setting sun of that day.*" Canandaigua was safe.

This record run was the talk of the town. What lends credence to the story is that the athlete was pointed out to Friends Emlen and Parrish when they came to Canandaigua that fall. Emlen identified him as "Sharp Shins" (Fenton, ed., 1965a: 296). Other runners took two and one-half days.

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Chiefs visiting Canandaigua that spring en route to Albany and returning insisted that the principal chiefs were the proper owners of the land, that Buffalo was the proper place of council, and that all officials who desired to do business with them must come there. They meant this for the governor of New York, and they remained adamant to the bitter end that Pickering observe the same protocol. Chapin honored their request three times during 1794. His willingness to observe the amenities of Indian protocol contributed to keeping them neutral. He assured them that the governor acknowledged them proper owners of the land and that they alone had the right to sell, and he then held that the governor had the right to purchase. Indeed, he quite wore out his moccasins on the path to Buffalo Creek; that summer he would exhaust himself traveling to Presque Isle to relieve the crisis over the Erie Triangle. By November he was a sick man who would die soon after the treaty.

In the eyes of the Buffalo Creek council, a few Indians, not the nation, had sold Presque Isle. Even Cornplanter, whom they accused of selling it, very much regretted having done so and now wanted relief from the terms of sale. He prepared to prevent its occupation. Pennsylvania, having acquired the northwestern lands in 1784



and the Erie Triangle by United States patent in 1792, was proceeding to survey and sell tracts for settlement. In the year preceding the treaty, the Pennsylvania assembly authorized laying out a town on Lake Erie. The following spring the governor sent an expedition under Captain Ebenezer Denny to fortify the port. He charged Denny to use extreme caution not to offend the Indians or alarm the British garrison. News of the move soon reached the Niagara garrison, which stirred up the Indians. It soon became apparent that both the Six Nations and the western Indians claimed this corridor. In their view it must stay open. The Six Nations foresaw that closing the corridor between them and the western confederacy spoiled their argument for recovering part of their lands. On this, Brant, the Buffalo chiefs, and Cornplanter were of one mind.

The tempers of the Six Nations were growing short. Learning that Denny had fortified Le Boeuf (Waterford), only sixteen miles from Presque Isle, the Buffalo Creek council summoned Cornplanter and the Allegheny chiefs to hear their [649] position. At Fort Franklin, General Wilkinson observed that "the English have soured their minds." The claims of the Six Nations rose with the military success of the western Indians and with British assistance. There would be no treaty at Venango that spring. The council sent a runner to Chapin, calling him to Buffalo to hear them refuse Knox's invitation.

A nasty murder brought the Presque Isle issue to a head. One May day a young frontier hothead, somewhat drunk, killed a Delaware Indian friendly to the garrison at the scene of the proposed treaty. Although the commandant at Fort Franklin arrested the offender, now the Indians had a real issue, and presents to the contrary, nothing short of Pennsylvanians' evacuating the area would satisfy them.

Communication was slow and confusing. Dispatch riders took a week between Canandaigua and Philadelphia, and equal time for the return; likewise from Fort Franklin via

Pittsburgh. Runners covered Buffalo Creek to Canandaigua in two days, summoning Chapin to council, while he waited for instructions. Secretary Knox yearned for reports, if only negative, by each post. Couriers passed between the War Office and the Pennsylvania governor. Small wonder that reports crossed orders and that the president counteracted the Pennsylvania governor and legislature. Cooperative federalism has never been simple.

By the end of May the president had decided it would be expedient to humor the Six Nations and suspend the Presque Isle establishment. Knox so informed Pennsylvania governor Mifflin. Chapin, sensing the policy drift but still lacking instructions, responded to the ~~Indian~~s' demands and reported the situation on 7 June. Through an agent he sought a personal interview with Brant, hoping to win him over to the United States. But he began to doubt the steadiness and reliability of Cornplanter, whom the British had lately loaded with presents. On returning home, Cornplanter had sent out runners calling a council at Allegheny, intending to descend on Venango and inquire into the circumstances of the murder. Responding to a runner from Buffalo, Chapin went as far as the Genesee and learned the purport of the message, but he deferred going on to Venango until his son returned from Philadelphia with instructions. The Indians agreed to wait. Chapin suspected that the reason Cornplanter had called the council was not the murder, but Cornplanter saw in it an opportunity to extricate himself from difficulties that had plagued him for ten years. Cornplanter and a few Senecas had sold the Presque Isle lands to Pennsylvania without the consent of the nation. No division of the money was ever made. He repeatedly denied having made the sale, which the nation held invalid. In the eyes of the Six Nations, Pennsylvania had sent troops to occupy lands owned by Indians. Cornplanter was indeed in a spot. Chapin sensed that the Venango meeting might be crucial for war or peace, and that it was his duty to attend. There he could confer with



Indians without British interference. Knox advised that the British were strengthening the garrison at the Miami rapids to nine companies, the obvious intention being to encourage the hostile Indians, to whom they were supplying arms and ammunition.

The president wanted the Indian war ended that year. Knox wrote Wayne that he did not think the British would seek a war with the United States just then, that he rather hoped Jay would succeed in adjusting any differences, and that the president had no intention that Presque Isle should upset negotiations in London [650] or bring the Six Nations down on the frontier. It was far cheaper to fund a treaty. To Chapin he sent a list of goods wanted by the Indians with instructions for distribution and accounting (Knox to Wayne in Knopf 1960: 327, 332; Knox to Chapin, O'Reilly Collection, 10: 16, NYHS).

[39]

* * * * * *

(2) The Treaty of Canandaigua, November 11, 1794.

(a) Events between 1784 and 1794. The New York Indians were not the only Indians who had taken sides with the British during the Revolutionary War and with whom it was necessary for the United States to negotiate treaties of peace and from whom the United States desired to obtain relinquishments of territorial [40] claims. Numerous Indians claimed or occupied parts of the area which later became known as the Northwest Territory (i.e., the area which today constitutes the states of Ohio, Indiana, Illinois, Michigan and most of Wisconsin) and were generally referred to, in the early days with which we are concerned, as "the western Indians."[27/] It was not until after the Battle of Fallen Timbers in August 1794 and the subsequent Treaty of Greenville in August 1795 that peaceful relations were established with these Indians.

The difficulties experienced by the United States with these Indians played a prominent part in the history of the period immediately following the Revolutionary War. That period (from the end of the Revolutionary War to the War of 1812) was a critical one in the history of the American struggle to establish a new and independent nation. (See

27/ Among the Indians generally designated as the western Indians were the Wyandots, Delawares, Shawnees, Chippewas, Ottawas, Pottawatomies, Miamis, Weas, Eel Rivers, Sacs, Foxes, etc.



Exhibit 61 for an exhaustive study of this period which particularly brings into focus the relation between Indians affairs and other events.) Britain had, after the war, determined upon a policy of treating the United States as an alien and rival nation and of awaiting the opportunity to undo the results of the war (Ex. 59, pp. 209-210). Among other things she refused to give up the frontier posts and attempted to keep alive warfare between the Indians and the United States (Ex. 59, pp. 227-229; Ex. 61, especially pp. 1-7, 11-17, 133, 161; see also Ex. 23, pp. 349-350). It was for a long period a British desire to set up a [41] barrier Indian state between Canada and the United States and to prevent the Indians from making peace and territorial cessions to the United States (see Ex. 61, especially pp. 14, 16, 109-133, 161, 263-264; see also Exs. 51, 53). The period between 1784 and 1794 marked one phase of this epoch and culminated in three treaties, two with the Indians and one with Great Britain, i.e., the Treaty of Canandaigua, November 11, 1794, with the Six Nations or New York Indians; the Jay Treaty, November 19, 1794, with Great Britain; and the Treaty of Greenville, August 3, 1795, with the so-called "western" Indians.

Efforts of the United States to establish peaceful relations with the Indians prior to these treaties were briefly as follows:

As we have already related, the United States, on October 22, 1784, about a year after the peace treaty of 1783 with Britain, entered into a peace treaty with the Six Nations (New York Indians) as Fort Stanwix (7 Stat. 15-16, Ex. 19, supra pp. 27-28, 31-33). Immediately thereafter, the Continental Commissioners proceeded to Fort McIntosh (near the junction of the Ohio River and Beaver Creek or River in the vicinity of the present town of Beaver, Pennsylvania) where a treaty of peace was concluded on January 21, 1785, with a portion of the western Indians, i.e., the Wyandots, Delawares, Chippewas and Ottawas (7 Stat. 16, Ex. 19; see Ex. 18, pp. 357, 391). It was not until January 31, 1786, that

a treaty was concluded with the Shawnees (7 Stat. 26-27, Ex. 22). Others of the western Indians were hostile, efforts to hold peace treaties [42] were unsuccessful, and it was feared that their hostile disposition would spread to the Indian nations already at peace with the United States (Exs. 23, 24, 25, 27).[28]/ On January 9, 1789, the treaties of Fort Stanwix (October 22, 1784) and Fort McIntosh (January 21, 1785) were confirmed at Fort Harmar by treaties with the Six Nations, the Wyandots, Delawares, Ottawas, Chippewas, Pottawatomies and Sacs (7 Stat. 28-35, Ex. 39; see also Exs. 28, 29, 34, 38). Hostilities continued on the part of many of the western nations and on November 4, 1971, the troops of General Arthur St. Clair, the Governor of the Northwest Territory, were defeated (Ex. 42). Early in 1792, as part of their efforts toward peace and to persuade the Indians of the friendship and good intentions of the United States, the President, through the Secretary of War, invited chiefs of the Senecas and others of the Six Nations to come to Philadelphia (Ex. 44, pp. 226-228). During that visit the United States agreed with the "five nations of Indians so called, being the Senecas, Oneidas, and the Stockbridge Indians incorporated with them, Tuscaroras, Cayugas and Onondagas" that it would "in order to promote the happiness of the five nations of Indians * * * cause to be expended annually the amount of one thousand five hundred dollars, in purchasing for them clothing, domestic animals and implements of husbandry, and for encouraging useful artificers to reside in their villages" (Ex. 44, p. 232; see Exhibit A, Dkt. 300, Pet. P. 9). [43] Hostilities with the western Indians still continued throughout this period and in 1794 there appeared to be danger that the New York Indians, or at least the Senecas, might take up arms against the United States. The matter which precipitated a

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28/ Although a treaty had been reached with the Shawnees in January 1786, they are frequently listed among the hostile Indians in the above documents.



crisis in relations with the New York Indians was action taken by Pennsylvania toward establishing a town at Presq' Isle (Presqu' Isle is the present site of the city of Erie, Pennsylvania, and is within the so-called Erie Triangle, see supra, pp. 9-10). On April 8, 1793, the General Assembly of Pennsylvania, stating that "Whereas establishing a town at Presqu' Isle would promote the settlement of the neighboring country and thereby place the frontiers of Pennsylvania in a safer position," enacted legislation authorizing the laying out of a town at Presq' Isle (Ex. 46, p. 503). When surveyors and garrisons were sent to the area, the Indians indicated sufficient hostility to alarm the President. Accordingly, acting through the Secretary of War, he requested on May 24, 1794, that the establishment at Presqu' Isle be suspended (Ex. 47). The Governor of Pennsylvania, deferring to the general government on a matter of war and peace, readily complied (Ex. 46, p. 506; Ex. 47, p. 713). In June the Indians held a council at Buffalo Creek which was attended by General Israel Chapin, United States Indian Agent in New York (Ex. 49). Chapin reported that the Indians were particularly agitated regarding Presqu' Isle (Ex. 48) and suggested that a treaty be held with the Six Nations to settle their differences with the United States (Ex. 48, pp. 520-521). It was thereupon determined to hold a treaty "for the purpose of amicably removing all causes of [44] misunderstanding and establishing permanent peace and friendship between the United States and the Six Nations" (Exs. 49, 50). Timothy Pickering, who was appointed to act as commissions on behalf of the United States, held a conference at Canandaigua,[29]/ New York, which resulted in the Treaty of November 11, 1794 (7 Stat. 44, Ex. 52).

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29/ Sometimes spelled Kon-on-daigua, Kanandaigua, Canandarqua, etc.

(b) The Treaty of 1794. By Article I of this treaty, peace and friendship were established between the United States and the Six Nations.

Article II provides as follows:

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

The reservations referred to, and the treaties with the state of New York by which they were created, are set forth, supra, pp. 16-17.

Article III provided as follows:

> The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles [45] eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork,



> continuing the same straight course, to that river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelp's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indians friends residing thereon and united with them, in the free use and enjoyment thereof; but in shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Thus, it appears that the eastern boundary of the lands acknowledged as belonging to the Senecas was the western boundary of the lands sold by the Six Nations to P helps and Gorham on July 8, 1788, as set out supra, pp. 13-14. It also

appears that part of the lands acknowledged to belong to the Senecas were west of the boundary line established at Fort Stanwix in 1784 and that the United States, by acknowledging them as Seneca lands, relinquished the rights ceded to it at Fort Stanwix (see Exhibit B showing the [46] Fort Stanwix boundary line and the western boundary of the Seneca lands as acknowledged in the treaty at Canandaigua).

Article IV of the treaty provided as follows:

> The United having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the fee use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.[30]/

Inasmuch as the lands acknowledged as belonging to the New York Indians lay entirely within the state of New York, the effect of the Indian engagement never to claim any other lands within the boundaries of the United States was to relinquish any claim to the disputed Erie Triangle, as well as to any other lands in Pennsylvania or elsewhere in the United States.

The Treaty of Canandaigua in no wise divested or impaired the rights of the states of New York or Massachusetts, nor did it enlarge the rights of the Indians.

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[30]/ The Mohawks had gone to Canada and were, therefore, not mentioned in the treaty.



See opinion of Attorney General Wirt, March 26, 1819 (Ex. 58, pp. 475-476); see also opinion of Richard Harrison, April 6, 1819 (Ex. 58, pp. 471, 475).

It is apparent on its face that the treaty was not intended to and did not create any greater rights in the Indians than had existed previously, with the exception of the area referred [47] to above which lay between the Fort Stanwix line and the western boundary of the Seneca lands as described in the Canandaigua treaty.[31]/ In the first place it recognizes the right of the state and Phelps and Gorham to purchase Indian title by describing the lands currently belonging to them by reference to the transactions which had occurred previously between the Indians and the states of Massachusetts and New York and Phelps and Gorham. And the very language used to spell out the undertaking by the United States is an explicit acknowledgement of that right. The treaty says "the United States will never claim the same nor disturb *** /the Indians/ *** in the free use and enjoyment thereof: but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." No other Indian treaty has been found which contains any such provision recognizing the right of the Indians to sell their lands to anyone other than the United States. This provision was an acknowledgment of the then well-known fact that either New York or those who had purchased the preemption right from Massachusetts had the right to purchase the Indian lands. Moreover, it was an acknowledgment that the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales to those "who have the right to purchase." Furthermore, it is a [48] recognition of the fact that the laws of New York (Exs. 1, 31), the treaties between

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[31]/ As to this area, the United States merely relinquished its claim. It is only to the extent that the Indians were relieved of any claim on behalf of the United States that they had a greater right than before.

New York and the Indians (e.g., Ex. 21), and the Hartford Compact (Ex. 26, p. 466) all placed restrictions on the purchase of Indian lands and that only certain persons had "the right to purchase." It is difficult to see how there can be read into the provisions of this treaty a guarantee by the United States that the Indians would be kept in possession of their lands in perpetuity or that the United States would see to it that they would receive any particular price for their lands when they sold them to New York or to the grantees of Massachusetts.

That the foregoing is the proper interpretation of the Treaty of Canandaigua is apparent from a draft of a letter dated December 26, 1794, from Pickering, the United States Commissioner, to Secretary of War Knox (Ex. 54).

As appears on Exhibit B attached hereto, part of the lands to which the Six Nations relinquished any claim at the Treaty of Fort Stanwix lay within the boundaries of the state of New York. In describing the lands which the United States by the Treaty of Canandaigua acknowledged to belong to the Seneca, Pickering bounded them on the west by a line which was west of the line laid down by the Fort Stanwix treaty. The effect, as has already been mentioned, was to relinquish any claim of the United States to an area within the state of New York lying between the two lines. When Knox received a copy of the Treaty of Canandaigua he apparently asked Pickering to explain why he had relinquished the right of the [49] United States to these lands.[32/] A draft of Pickering's reply (Ex. 54) is found among the Pickering Papers which are in the custody of the Massachusetts Historical Society in Boston. Pickering gave his reasons as follows:

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32/ That such a request was made is obvious from Pickering's reply (Ex. 54). However, a copy of the request has not been found and it is possible that it was oral and not written.



1. I knew that the U. States had no right to any part of the Seneka Country, but by virtue of the cession made by the States of New York and Massachusetts, which congress had accepted.

2. I knew that the line of cession,[33/] when ascertained by Mr. Elliot, was what now constitutes the eastern boundary of the triangular piece of land which the U. States sold to Pennsylvania. ~~and consequently, that the U. States had no right to one feet of the land in question~~.

3. I knew that by the agreement between the two states of New York and Massachusetts, the pre-emption right to all the land in question belonged to Massachusetts; excepting a strip, a mile wide, along the strait of Niagara, which I understood New York was to retain; and that the whole lay within the Jurisdiction of New York.

4. I knew that by the Constitution of the State of New York, no purchase or contract for the sale of lands ~~within the state~~ made of or with the Indians, within the limits of that state, could be binding on the Indians, or deemed valid, unless made under the authority, and with the consent of the legislature of that state. And from the nature of the case, I knew that such authority and consent could never have been given, in regard to the lands [50] in question, when, ~~they were~~ in the terms of the treaty of Fort Stanwix, they were ceded to the United States.//

5. I knew, therefore, that the United States had no ~~proper title to~~ right to the lands which I

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33/ I.e., the cession of territory by New York and Massachusetts to the United States.

relinquished. In truth, when I proposed to give up the tract between the Pennsylvania Triangle and the Meridian of the Mouth of Buffaloe Creek, I felt myself embarrassed – not in making the relinquishment itself – but for words to express it which should not be deceptive, ~~For while it might to impress the minds of the Indians with an idea that the relinquishment was of~~ by presenting an idea of something very valuable, while in fact the subject of the relinquishment was a shadow. The words used in my speech were these – "All this tract you, by former treaties ceded to the United States: but I am now willing to relinquish all their claim to it."

6. I knew the practical construction of the New York Constitution on this point. John Livingston and others obtained from the Six Nations a vast cession of land within that state, which had been made void, because done without the Consent of the Legislature, and I considered that the United States had no better right than individuals to ~~acquire a property in the same Indian lands~~ receive from the Indians (words crossed out) a cession of the same lands.

7. It is true, that I strenuously endeavored to obtain the strip of land four miles wide, along the strait of Niagara; and I also inserted an article to comprehend the land round the Fort of Oswego, to the extent of six miles square – because the same had been comprehended in the treaty of fort Stanwix, but not seeing how the United States exclusively could hold these lands I had draughted another article, in these words, "All the cessions & relinquishments of the rights & claims of the Six Nations & each of them hereby made, shall be for the benefit of the United States & any of them, and of any citizen or citizens thereof, to whom, accordingly to their laws and



usages, the right of taking & holding the same, does or shall belong." -- The form which the treaty finally assumed, superseded this provision. [51]

8. The objects of ~~my mission to~~ my conference with the Six Nations were, to remove from their minds all causes of complaint and to establish a firm & permanent friendship.

The great cause (words crossed out) of complaint, from all the Indian Nations,//Nations, it is too well known, has been the ~~unreasonableness~~ depriving them of their lands, by means not always honourable (words crossed out) too often fraudulent, & sometimes to an unreasonable extent.

The Six Nations, particularly the Senekas, have frequently complained of the treaty of fort Stanwix. Their complaints of that & of the subsequent treaties on the Ohio were renewed at the late conference. ***

Pickering went on to discuss the complaints of the Indians in this regard and expressed his belief that he was further justified in making the relinquishment because the purpose of the treaty was to settle differences with the Indians in order to preserve peace whereas to insist upon the kind of extinguishment of Indian title as had been obtained at Fort Stanwix would be to risk war.[34]/

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[34]/ Although Pickering was correct in his belief that the United States could acquire no title to lands in New York by cession from the Indians, he was not correct in believing that the United States had nothing to relinquish. The United States could have insisted upon the extinguishment of Indian title under the Treaty of Fort Stanwix for the benefit of the state or its grantees. See Clark v. Smith, 13 Pet. 195, 200-201 (1839); 30 Op. A.G. 284 (1914); Am. St. Pap. (Pub.

*(Footnote continued on next page)*

On the basis of the foregoing, it is obvious that Pickering was fully aware of the fact that the states, not the United States, had title to the lands, that he was aware of the New York-Massachusetts [52] Compact, and of the New York laws prohibiting purchases of Indian lands without the consent of the state. It is further clear that when he acknowledged certain lands to belong to the Indians he was recognizing their rights as derived from the states, that when he said that "the United States will never claim the same" he was relinquishing any rights previously acquired at Fort Stanwix by right of conquest and promising that "the United States" would assert no future claims to their lands and that when he said that the lands "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase" he acknowledged both the right of the Indians to sell and the right of the states or their grantees to purchase. It was a recognition only of rights which already existed and a disclaimer of any right in the United States to interfere. It was not an affirmative undertaking by the United States to take action of any kind much less to indemnify the Indians if it failed to take some undefined action.

Between 1794 and about 1850 numerous purchases of lands claimed by the Indians in New York were made either by the state of New York or the owners of the right of preemption which they had acquired by grant from the state of Massachusetts. As to these purchases, petitioners make the same contentions made regarding the Treaty of Fort Stanwix in 1784 (see supra, p. 35), i.e., that defendant failed in its duty expressed in the Treaty of 1794 to protect petitioners and keep

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*(Footnote continued from previous page)*

Lands), vol. 1, p. 532. However, as Pickering stated, the United States were under no obligation to extinguish the Indian title in New York except for their own benefit and he felt it unwise to insist upon the extinguishment when his purpose was to promote peace.



them secure in the use and possession of their lands and that it failed to lend any aid or assistance to [53] petitioners but permitted them to be exploited and to be unconscionably deprived of their lands for a grossly inadequate consideration (Docket No. 300A, Pet. par. 11; Docket No. 301, Pet. pars. 20, 25, 30, 45, 50, 52; Docket No. 342, Pet pars. 18, 23, 36, 65, 70, 86, 91, 95, 106; Docket No. 343, Pet. pars. 16, 20). As we have shown, the Treaty of Canandaigua clearly contemplated the sales which were subsequently made and the United States undertook no obligation with reference thereto. Consequently, there is no basis for imposing any liability upon the United States for claims arising out of such sales.

Finally, a few claims are based upon alleged trespasses and other wrongful acts by third persons. What has been said with reference to the purchases is ample to show that the United States cannot be held liable for these claims.

*Opinion of Attorney General William Bradford*
(June 16, 1795)

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The attorney General has the honour of stating his opinion upon the question propounded to him by the Sec. of War, viz; whether the State of New York has a right to purchase from the Six Nations or any of them the lands claimed by those nations and situate within the acknowledged boundaries of that State without the intervention of the general government.

By the Constitution of the United States, Congress has power to regulate commerce with the Indian Tribes, and by the act of 1 March 1793, it is expressly enacted, that no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in Law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution that it shall be a misdemeanor in any person not employed under the authority of the United States in negotiating such Treaty of convention directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, [unclear notation].

The language of this act is too express to admits of any doubt upon the question unless there be something in the circumstances of the case under consideration to take it out of the general prohibition of the law.

Nothing of this kind appears on the documents submitted to the attorney General. It is true, that by treaties made by the State of New York with the Oneidas, Onondagas and Cayuga, previous to the present Constitution of the United States, those nations ceded all their lands to the people of New York, but reserved to themselves and their prosperity



forever for their own use & cultivation, but not to be held, leased or in any other manner disposed of to others, certain tracts of their said lands with the free right of hunting and fishing. [And] so far, therefore, as respects the lands thus reserved the treaties do not operate further than to secure to the State of New York the right of preemption but subject to this right they are still the lands of those nations and their claims to them, it is conceived cannot be extinguished but by a treated holden under the authority of the United States, and in the manner prescribed by the laws of Congress.

Supreme Court, U.S.
FILED
JAN 20 2004
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No. 03-855

IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner,*

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF *AMICUS CURIAE* STATE OF NEW YORK IN SUPPORT OF PETITIONER CITY OF SHERRILL

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## INTEREST OF THE AMICUS CURIAE

This case presents the critical question whether the more than 250,000-acre Oneida Indian reservation in central New York State, which was created in a state treaty in 1788 and acknowledged by the United States in 1794, was later terminated when the Oneidas remaining on the reservation in 1838 agreed to remove from New York in the Treaty of Buffalo Creek. Treaty of January 15, 1838, 7 Stat. 550. The Second Circuit held that several parcels recently acquired by the Oneida Indian Nation of New York (the "Nation") within the 1788 boundaries are not subject to local real property taxation because the land today remains Indian country under 18 U.S.C. § 1151(a). *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003) ("*Sherrill*"). This conclusion imperils the tax and civil regulatory jurisdiction that the State has exercised over the region for more than 150 years. Under the court's decision, the Nation may remove any land within this vast region from the tax rolls of local governments simply by purchasing it, thereby threatening the local tax base and financial well-being of communities in the area. Because state regulatory authority over tribal land in Indian country is restricted, the decision also jeopardizes the orderly and uniform application of law by the State and local governments throughout the region.

Moreover, the court's decision is already affecting parts of the State beyond the borders of the Oneidas' historic lands. The decision is being relied upon by other tribes that are now litigating land claims against the State in support of the assertion that their mere purchase of land within their claim area renders the land exempt from state and local taxation, and land use and environmental regulation. *See Cayuga*

*Indian Nation of New York v. Village of Union Springs*, 2003 U.S. Dist. LEXIS 21578 (N.D.N.Y. Nov. 28, 2003); *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, 03-CV-690 (N.D.N.Y.) (both actions regarding property located within the approximately 64,000-acre Cayuga land claim area in upstate New York). The State has a vital interest in continuing to assert its longstanding jurisdiction over these lands as well.

In this brief, amicus curiae State of New York concentrates on the Buffalo Creek Treaty because the State has an interest in assuring that the treaty is correctly interpreted.[1] In holding that Buffalo Creek did not terminate the Oneida reservation, the Second Circuit ignored the fact that Buffalo Creek was a removal treaty designed "to release the Eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites." *New York Indians v. United States*, 30 Ct. Cl. 413, 450 (1895), *rev'd on other grounds*, 170 U.S. 1 (1898). Because the court downplayed the treaty's background, it erroneously concluded that Congress intended the reservation to continue even after the Oneidas agreed in Buffalo Creek to remove to a new reservation created for them by the United States in the Indian territory halfway across the continent.

## HISTORICAL BACKGROUND OF THE BUFFALO CREEK TREATY

A brief description of the Treaty of Buffalo Creek is essential to understanding the issues in this case. The treaty itself is explicit about its background and purpose. Its

1. Our focus on Buffalo Creek in this brief is not in derogation of the other questions presented in the petition for certiorari.



preamble recounted over 20 years of federal efforts to remove the New York Indians, including the Oneidas, from New York. Preamble, 7 Stat. at 550-551. The treaty recited that its purpose was to carry out the "policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory." Preamble, 7 Stat. at 551. Federal removal policy, articulated by the Indian Removal Act of 1830, 4 Stat. 411, was designed to "mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, p. 79 (1982 ed.). In furtherance of the federal removal policy, Buffalo Creek was intended "to release the Eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites," *New York Indians*, 30 Ct. Cl. at 450, and thereby end the very types of jurisdictional conflicts at issue here.

Buffalo Creek's terms gave effect to the removal purposes of the treaty, expressly providing for the removal of the Oneidas from New York. In the treaty, the Oneidas and the other New York Indians ceded to the United States lands previously granted them in Wisconsin (except for a tract that became the present Oneida reservation in Wisconsin) and received a new 1,824,000-acre reservation in modern-day Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes . . ." Arts. 1, 2, 7 Stat. at 551-552. The new reservation was to be the "future home" for, among others, the 620 "Oneidas . . . [then] residing in the State of

New York." Art. 2, Sch. A, 7 Stat. at 551-552, 556.[2] Buffalo Creek provided that the Oneidas could henceforth "establish their own form of government, appoint their own officers, and administer their own laws" on the Kansas lands designated as "their new homes." Art. 4, 7 Stat. at 552. The treaty's terms restricted the Oneida's exercise of these powers of tribal sovereignty and jurisdiction to "said country," *i.e.*, the part of the new reservation specifically delineated for occupation by the Oneidas. Arts. 4, 5, 7 Stat. at 552. Finally, the treaty provided for the disposition of the Oneidas' remaining lands in New York. The Oneidas "hereby agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. at 554. Following Buffalo Creek, the Oneidas entered several treaties with the State providing for the sale of portions of their New York lands. *New York Indians v. United States*, 40 Ct. Cl. 448, 469-70 (1905).

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2. The court below mistakenly held that the New York Oneidas were not intended to share in the Kansas lands because they "had a permanent residence in New York State." *Sherrill*, 337 F.3d at 161 n.17. Buffalo Creek set apart an amount of land in Kansas more than sufficient to provide 320 acres to each of the New York Indians enumerated in the census set forth in Schedule A to the treaty, including the 620 New York Oneidas. *See* Sch. A, 7 Stat. at 556; *New York Indians v. United States*, 40 Ct. Cl. 448, 458 (1905). The treaty specifically provided that the Kansas lands were "intended as a future home" for the Oneidas residing in the State of New York. 7 Stat. at 551-552. Moreover, as discussed at Point I below, the fact that the Kansas lands were intended to be the new home of, among others, the New York Oneidas, was shown by the fact that they shared in the recovery in *New York Indians v. United States*, 170 U.S. 1 (1898).



## SUMMARY OF ARGUMENT

Because the Second Circuit ignored Buffalo Creek's removal-era background, it misconstrued the treaty. The court held that the Oneidas' agreement to remove from New York to a new reservation created for them in what is now Kansas was conditional and did not terminate their New York reservation. This holding is at odds with this Court's holdings in *New York Indians v. United States*, 170 U.S. 1 (1898), that the Oneidas agreed in Buffalo Creek to remove from New York and in *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), that a tribe that accepted a new reservation released and relinquished tribal rights over other lands. Here, the Oneidas' agreement in Buffalo Creek to remove from New York and their acceptance of the new reservation terminated their jurisdiction over lands in New York. This Court should grant the petition to resolve this conflict regarding the correct interpretation of this important federal removal treaty.

Additionally, the Court should grant the petition because the issue presented is of exceptional importance to New York State and its citizens. The decision below allows the Nation and, by extension, other Indian tribes with claims to New York lands, to exempt area lands from much State and local tax and civil regulatory authority simply by purchasing them. The potential for the disruption of the orderly administration of law in this area, comprising a large part of two central New York counties, is substantial. Moreover, this disruption is occurring now: In both the Oneida and the Cayuga land claim areas, the tribes are contesting the authority that the state and local governments have exercised over the area for generations. This Court should grant the petition to reaffirm the State's historic jurisdiction over these lands and avert regulatory chaos in the region.

## REASONS FOR GRANTING THE PETITION

### I. The Second Circuit's Treatment Of Buffalo Creek Conflicts With This Court's Interpretation Of The Treaty In *New York Indians v. United States*, 170 U.S. 1 (1898), And Ignores This Court's Decision In *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), That A Tribe's Acceptance Of A New Reservation Releases And Relinquishes Tribal Claims To Other Lands.

#### A. This Court held in *New York Indians* that in Buffalo Creek the Oneidas agreed to remove from New York.

This Court's holding in *New York Indians* conflicts with the central premise of the decision below. The Second Circuit's misinterpretation of Buffalo Creek is grounded in its mistaken belief that the "central bargain" of the treaty was the Indians' exchange of their Wisconsin lands for new lands west of the Mississippi. *Sherrill*, 337 F.3d at 160; *see also id.* at 164 (the land exchange was the "rationale for the award" to the New York Oneidas and others in *New York Indians*). But in *New York Indians*, this Court held that the Indians' agreement to remove to the west, rather than the Wisconsin-Kansas land swap, was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in the Indian territory. *New York Indians*, 170 U.S. at 15. Additionally, citing Article 13 of Buffalo Creek, this Court held that the Oneidas' agreement to remove "as soon as" they sold their remaining lands to the State was sufficient under the treaty to avoid a forfeiture of the new lands under a treaty stipulation that any of the tribes that did not "accept and agree to remove to" the new lands in five years or at such



other times prescribed by the President would forfeit the new lands. *Id.* at 26.

This Court held that, by virtue of agreeing to remove, the Oneidas obtained an interest in the new lands that the United States became obliged to pay for years later, after it sold the land to non-Indian settlers. *See id.* at 26, 36. The fact that the New York Oneidas shared in this award, *see New York Indians v. United States*, 40 Ct. Cl. 448, 467, 471-72 (1905), established that their removal agreement in Buffalo Creek was not, as the Second Circuit mistakenly asserted, simply an "agreement to agree" conditioned on subsequent land sales to New York State. *Sherrill*, 337 F.3d at 161.[3] In Article 13, the Oneidas agreed to remove "as soon as" they disposed of their lands, not "only if" they were able to sell them. This Court has recently recognized that an agreement to remove "as soon as" an expected imminent event occurs is a present agreement to remove. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189-90, n.4 (1999) (noting that the United States negotiated several "removal treaties" with Indian tribes in 1837 including one with the Saganaws, 7 Stat. 528, 530, in which the tribe agreed to remove from Michigan "as soon as a proper location can be obtained").

Consequently, in *New York Indians*, this Court held that the Oneidas' agreement to remove was complete upon their execution of the treaty. The prospect that the Oneidas might

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3. Indeed, elsewhere in its opinion, the Second Circuit recognized that the Oneidas had not simply "agreed to agree" to remove. *See Sherrill*, 337 F.3d at 165 n.22 (acknowledging, apparently in contradiction of its earlier statement, that *New York Indians* held that the Oneidas obtained nonforfeitable rights to the Kansas lands "merely by their agreement to remove").

not actually remove did not undo their agreement or vitiate their rights in the Kansas lands. According to this Court, the Oneidas' agreement to remove made them, together with the other New York tribes that agreed to remove, the owners of the Kansas lands. Thus, the Second Circuit's conclusion that the Oneidas did not agree to remove from New York in Buffalo Creek squarely conflicts with this Court's holding in *New York Indians* that they did.

Additionally, the Second Circuit's heavy reliance on a purported statement to the Oneidas by the United States treaty commissioner that Buffalo Creek did not require them to remove, *Sherrill*, 337 F.3d at 161-62, is at odds with *New York Indians*. There, this Court concluded that a treaty proviso adopted by the Senate requiring an explanation of its Buffalo Creek amendments to the New York tribes and each tribe's assent thereto and permitting the President to deduct from the new reservation 320 acres for each Indian who did not remove never became effective because there was no evidence that the President ever approved the proviso. 170 U.S. at 22-23. The alleged statement cited by the Second Circuit appears in the record below as a photocopy of a handwritten document attached as an exhibit to an attorney affidavit. Jt. App. 1312-1313. This alleged statement is not annexed to the treaty as reproduced in Statutes at Large and there is no evidence that it was ever approved by the Senate or the President. *See* 7 Stat. at 562-63 (no qualification of the Oneidas' agreement to remove); *cf.* Supp. Art., 7 Stat. at 561, 564 (explicitly providing that the United States would not compel the St. Regis Indians to remove). In any event, whether or not the United States intended to force individual Oneidas to leave New York, the Oneidas' agreement to remove terminated any tribal jurisdiction in the State.



**B. The Second Circuit's decision conflicts with this Court's decision in *Santa Fe* that a Tribe's acceptance of a new reservation relinquishes tribal claims to other lands.**

The Second Circuit's holding that Buffalo Creek did not terminate the Oneidas' New York reservation also conflicts with this Court's holding in *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). In that case, the Walapai Indians requested that a new reservation be created for them because of the encroachment of settlers onto their lands. The President created the new reservation by executive order and the Walapais accepted it, although only a few actually moved there. Nevertheless, this Court held that the creation of the new reservation and the tribe's acceptance of it amounted to a relinquishment of any tribal claims to lands outside the new reservation. *Santa Fe*, 314 U.S. at 357-58.[4] More recently, four Justices of this Court, citing *New York Indians* and *Santa Fe*, observed with respect to an issue not resolved by the Court that whether the Oneidas abandoned their claim to lands in New York when they signed Buffalo Creek is a "serious question." *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 269 n.24 (1985) (Stevens, J. dissenting).

The decision below also conflicts with the holding of the Seventh Circuit in *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 458-59 (7th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999), that hunting and fishing rights reserved in lands

4. In *Santa Fe*, this Court found that creation of an earlier reservation never accepted by the Walapais did not extinguish their claim to their old lands. *Santa Fe*, 314 U.S. at 354-55. That holding does not control this case because the Oneidas agreed in Buffalo Creek to remove from New York to their new reservation and accepted the benefit of the new reservation.

that the tribe ceded to the United States in an 1831 treaty were terminated by an 1848 treaty in which the tribe agreed to cede to the United States its remaining Wisconsin lands and remove to Minnesota, although the hunting and fishing rights were not mentioned in the 1848 treaty and the tribe never left Wisconsin.[5]

Thus, this Court should grant the petition because the Second Circuit's conclusion that the Oneidas' acceptance of the new reservation and their agreement to remove to it did not terminate tribal sovereignty over any lands in New York conflicts with this Court's holding in *Santa Fe* and the Seventh Circuit's holding in *Menominee Indian Tribe*.

### C. The Oneidas' agreement to remove and their acceptance of a new reservation resulted in the relinquishment of tribal jurisdiction over their New York lands.

This Court's decision in *New York Indians* establishes that the Oneidas accepted the new western reservation when they agreed in Buffalo Creek to remove to it. Although only a few Oneidas actually removed, the Oneidas received the benefit of their bargain: they were paid for the new reservation in *New York Indians*. *Santa Fe* establishes that the benefit came with a corresponding burden, which the Oneidas now seek to disavow: the Oneidas' agreement relinquished their tribal jurisdiction over any lands in

5. The decision below is also in tension with the Seventh Circuit's holding in *Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 223-24 (7th Cir. 1993) (hunting and other occupancy rights retained by the tribe in land ceded to the United States in an 1842 treaty were extinguished in an 1854 treaty ceding their lands to the United States in exchange for a promise of reservations and annual payments), *cert. denied*, 510 U.S. 1196 (1994).



New York. *See Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 225 (7th Cir. 1993) (tribe's acceptance of treaty benefits implies acceptance of treaty burden of surrender of right of occupancy), *cert. denied*, 510 U.S. 1196 (1994); *see also* Brief of Amicus Curiae United States at 30-33, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (No. 83-1065) (although disavowing a "concluded view" on the relinquishment question, the United States noted that, because the Oneidas successfully sued to enforce their rights under Buffalo Creek, "a court might conclude that the Oneidas should not now be heard to contend that much of New York was not released from Indian tenure after all") (citation omitted). The Second Circuit was bound to follow *New York Indians* and *Santa Fe*.

Congress' intent to terminate the Oneidas' New York reservation is apparent from the terms of Buffalo Creek. The Oneidas' agreement to remove to a new home in the Indian territory and to establish a government and administer laws there, rather than on the New York lands from which they had just agreed to remove, superseded whatever rights the Oneidas may have had in the region under the 1794 Treaty of Canandaigua. Treaty of November 11, 1794, 7 Stat. 44. The continued existence of a more than quarter-million-acre "reservation" in central New York is fundamentally at odds with a treaty agreement to remove a thousand miles west and exercise sovereignty in a new home. Buffalo Creek provided for the disposition of the Oneidas' remaining New York lands in the expectation that there would no longer be an Oneida reservation in New York. Moreover, the removal policy's goal of avoiding conflicts of state and tribal sovereignty could be accomplished only if Oneida sovereignty over the area from which they were obligated to remove was terminated. Necessarily, by terminating tribal

jurisdiction, Buffalo Creek terminated the reservation. Accordingly, even though individual Oneidas remained in New York, the language and purpose of Buffalo Creek compel the conclusion that the Oneidas relinquished all of their tribal sovereignty over lands in New York when they accepted the new western reservation.

The Second Circuit, however, discounted the clear import of the treaty, instead relying heavily on the absence of explicit language of cession and payment in Buffalo Creek in support of its conclusion that the treaty did not terminate the Oneida reservation. *See Sherrill*, 337 at 159-61 ("[t]here is no specific cession language, and no fixed sum payment for opened land in New York").[6] The court's heavy reliance on the absence

6. The court's reliance on the absence of cession and payment language is at odds with this Court's holding that a reservation may be diminished despite the absence of any language of cession, or indeed any agreement by the tribe for the cession of its lands. *See Hagen v. Utah*, 510 U.S. 399, 411-14 (1994) (finding disestablishment where reservation land was "restored to the public domain" by statute, although the tribe refused to enter a treaty for cession of its land); *see also Solem v. Bartlett*, 465 U.S. 463, 471 (1984) ("explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977) (express language of termination is not required). Moreover, the court's heavy reliance on what it mistakenly viewed as the absence of "substantial and compelling evidence" in the treaty's text of congressional intent to disestablish the reservation, *Sherrill*, 337 F.3d at 161 (internal quotation omitted), conflicts with this Court's holding that such intent also may be discerned from the surrounding circumstances and legislative history. *See Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Here, the surrounding circumstances and legislative history of the Buffalo Creek treaty, as well as its provisions, establish that the Oneidas' New York reservation was terminated.



of cession and payment language in Buffalo Creek was especially misplaced because the underlying fee to the Oneida lands was in the State, which was not a party to Buffalo Creek, rather than in the United States. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (original 13 states held the fee title or preemptive right to Indian lands within their boundaries). Instead of ceding their New York lands to the United States, which had no right to them, the Oneidas agreed in Article 13 to remove to the new reservation "as soon as" they sold their remaining New York lands to the State.

The Second Circuit also downplayed the facts that for well over a century the population of the area has been predominantly non-Indian and that the state and its localities have exercised jurisdiction over virtually the entire area for over 150 years.[7] The court dismissed this evidence, finding that the largest influx of non-Indians in the area occurred prior to Buffalo Creek as a result of prior sales of Oneida lands to the State or private parties. *Sherrill*, 337 F.3d at 163-64. Even if, as the court found, the influx of non-Indian settlers was not linked to the treaty, the Congressional directive that the Oneidas were to sell their remaining lands and remove may well have reflected Congress's recognition

7. A finding that the Oneida reservation has been terminated is not precluded by the fact that a 32-acre parcel in the area is recognized as Oneida land today. *See, e.g., United States v. Boylan*, 265 F. 165 (2d Cir. 1920), *error dismissed*, 257 U.S. 614 (1921). Indian country may include non-reservation areas. *See* 18 U.S.C. § 1151(b) (dependent Indian communities); 1151(c) (Indian allotments); *DeCoteau v. Dist. Co. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 446-47 (1975) (statute terminated the reservation despite the existence within the former reservation area of Indian allotments that remained Indian country under 18 U.S.C. § 1151[c]).

of the *de facto* termination that had already largely occurred.[8] Moreover, the Second Circuit's observation that the influx of non-Indian settlers is the "least compelling" consideration in the allotment context has no force in the context of a removal treaty such as Buffalo Creek. *Sherrill*, 337 F.3d at 164. In contrast to the allotment cases, where the Indians were expected to remain on their allotted lands in the vicinity of lands that were opened to settlement by others, the premise of Buffalo Creek was that the Oneidas were to leave New York entirely and move far away to a new reservation. The fact that the area has been for many years populated predominantly by non-Indians bears out this expectation.

8. The Indian Claims Commission ("ICC") found that the Oneidas sold the bulk of the reservation to New York State with the knowledge of the United States in a series of negotiated transactions beginning in 1795. *Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 375 (1978). The ICC also found that Article 13 of Buffalo Creek constituted a federal authorization for the Oneidas to convey their remaining lands to the State. *Id.* at 385. Additionally, the ICC found that in purchasing Oneida land, New York had been doing "what would otherwise have been the Government's job, *i.e.*, buying lands from the New York Indians in order to persuade them to move west . . . In New York State, the state was carrying out [the Federal Government's removal] policy. . . ." *Id.* at 405.

Although two district court decisions have held that Buffalo Creek did not retroactively ratify prior land purchases by the State so as to extinguish any causes of action for violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, these cases did not address the issue of whether Buffalo Creek prospectively terminated reservation status. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485, 492-93 (N.D.N.Y. 1990), *appeal pending* (2d Cir.); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 539 (N.D.N.Y. 1977), *affirmed and remanded*, 719 F.2d 525 (2d Cir. 1983), *affirmed in part and reversed in part*, 470 U.S. 226 (1985).



In summary, the decision below conflicts with the decisions in both *New York Indians* and *Santa Fe* regarding the effect of the Oneidas' agreement to remove from their New York lands. This Court should grant the petition to resolve this conflict.

## II. The Question Whether Buffalo Creek Terminated The Oneida Reservation Is Of Exceptional Importance To New York State.

The question whether or not the more than 250,000-acre Oneida "reservation" was terminated over a century and a half ago is of great importance to the State, its localities, and the predominantly non-Indian population of the area. The Second Circuit's decision has created great confusion regarding the State's tax and regulatory authority over this vast area, comprising a large part of two New York counties. The decision below authorizes the creation of scattered tax-exempt tribal enclaves of restricted state jurisdiction anywhere within this large area by unilateral tribal action. The resulting potential for disruption of the application of state law in the area is significant. Finally, the decision below disregarded the importance of the reasonable expectations of those who have lived in the area for generations. The court ignored the practical consequences to the state and local governments, as well as the residents of the area, if a non-Indian area that has long been governed by the State is returned to Indian country status. This Court should grant the petition to assure that its precedents regarding this important issue are followed and that a reservation that Congress terminated long ago is not resurrected over 150 years after the land has passed from tribal jurisdiction.

## CONCLUSION

For the foregoing reasons, amicus curiae State of New York respectfully urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner,*

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## JOINT APPENDIX

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**NOTICE**

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| Filing Date | Docket Text |
|---|---|
| February 4, 2000 | COMPLAINT filed |
| February 25, 2000 | ANSWER to Complaint and COUNTERCLAIMS by City of Sherrill against Oneida Nation NY |
| March 14, 2000 | ANSWER by Oneida Nation NY to counterclaim |
| June 14, 2000 | ORDERED, that Civil Actions 00-cv-223 and 00-cv-327 are Consolidated; that 00-CV-223 is designated the Lead Action and further reassigning this action from Mag/Judge DiBianco to Mag/Judge Sharpe. |
| July 14, 2000 | MOTION by Ira S. Sacks, Esq for City of Sherrill for Summary Judgment , or in the Alternative for Preliminary Injunction . Hearing set for 9:30 on 2/23/01. Motion returnable before Mag. Judge Hurd. |

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| | This Motion was received by the Court on 1/30/01, but is considered filed as of 7/14/00, pursuant to the CJRA Reporting requirements instituted March 1, 2000. |
| September 11, 2000 | CROSS MOTION by Peter D. Carmen, Esq for Oneida Indian Nation for Summary Judgment . Hearing set for 9:30 on 2/23/01 before Judge Hurd. This Cross Motion was received by the Court on 1/30/01, but is considered filed as of 9/11/00, pursuant to the CJRA Reporting requirements instituted March 1, 2000. |
| September 20, 2000 | ORDER reassigning case to Judge Hurd for all further proceedings |
| October 30, 2000 | MOTION by Peter D. Carmen, Esq for defendants Halbritter, George, Fougnier, John, Hill, Rood, Lynch, Phillips, Rodgers, Green, Burr, and Patterson to Stay action 5:00-cv-1106 (member case) pending adjudication of 5:00-cv-223, |



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| | and to Dismiss this action 5:00-cv-223 for failure to state a claim and for lack of jurisdiction . Hearing set for 9:30 on 2/23/01. Motion returnable before Judge Hurd. This Motion was received by the Court on 1/12/01, but is considered filed as of 10/30/00, pursuant to the CJRA Reporting requirements instituted March 1, 2000. |
| November 13, 2000 | MEMORANDUM of Law Order by State of New York in opposition to Plaintiff's Motion for Summary Judgment and in Support of City of Sherrill's Motion for Summary Judgment. |
| November 13, 2000 | MEMORANDUM of Law of Proposed Amici Curiae in opposition to the Oneida Indian Nation's Motion for Summary Judgment and In Support of the City of Sherrill's Motion for Summary Judgment by Madison County, Oneida County |
| November 13, 2000 | AFFIDAVIT of David M. Schraver, Esq. on behalf of |

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| | Madison County, Oneida County Re: in support of Memorandum of Law of Proposed Amici Curiae in support of City of Sherrill's Motion for Summary Judgment and in Opposition to Oneida Indian Nation of New York's Summary Judgment with Exhibits A through V. |
| November 13, 2000 | Letter application received from Oneida LTD., requesting leave to appear amicus curiae and to file the "Memorandum of Law and Addendum in opposition to the Oneida Indian Nation's Motion for Summary Judgment and in Support of the City of Sherrill's Motion for Summary Judgment or in the alternative for a preliminary injunction. |
| November 13, 2000 | MEMORANDUM of Law by Oneida LTD. in support of application to appear as an amicus curiae and for leave to file Memorandum of Law and Addendum in Opposition to Oneida Indian Nation's motion for summary judge and in |



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| | support of the City of Sherrill's motion for summary judgment. |
| November 13, 2000 | MEMORANDUM of Law and Addendum of Proposed Amicus Curiae, Oneida Limited in Opposition to the Oneida Indian Nation's Motion for Summary Judgment and In Support of the City of Sherrill's Motion for Summary Judgment or in the alternative for a preliminary injunction by Oneida LTD. |
| November 13, 2000 | AFFIDAVIT of Charles G. Curtis on behalf of Oneida LTD. |
| November 13, 2000 | AFFIDAVIT of Catherine H. Suttmeir on behalf of Oneida LTD. |
| December 6, 2000 | LETTER RESPONSE dated 12/6/00 by Ira Sacks, Esq for City of Sherrill in opposition to the motion to stay discovery filed pursuant to 12/6/00 order of Judge Hurd. |
| December 12, 2000 | LETTER REPLY dated 12/12/00 by Peter D. |

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| | Carmen, Esq for Oneida Indian Nation in response to the City of Sherrill's letter brief opposing a stay of discovery while cross-motions for summary judgment are pending before Judge Hurd with Exhibits 1-9 attached. |
| December 15, 2000 | LETTER SUR-REPLY dated 12/14/00 by Ira S. Sacks, Esq for City of Sherrill in response to the Letter Reply by Oneida Indian Nation regarding the Stay of Discovery motion. |
| January 12, 2001 | MEMORANDUM of LAW by Peter Carmen, Esq for defendants Halbritter, George, Fougnier, John, Hill, Rood, Lynch, Phillips, Rodgers, Green, Burr, Patterson in support of motion to Stay action 5:00-cv-1106 (member case) pending adjudication of motion to Dismiss this action 5:00-cv-223 for failure to state a claim and for lack of jurisdiction |
| January 12, 2001 | AFFIDAVIT of Peter D. Carmen, Esq on behalf of |



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| | defendants Halbritter, George, Fougnier, John, Hill, Rood, Lynch, Phillips, Rodgers, Green, Burr, and Patterson Re: motion to Stay action 5:00-cv-1106 (member case) pending adjudication o f 5 :00-cv-223, motion to Dismiss this action 5:00-cv-223 for failure to state a claim and for lack of jurisdiction |
| January 12, 2001 | MEMORANDUM of Law by Ira S. Sacks, Esq The City of Sherrill in opposition to motion to Stay action 5:00-cv-1106 (member case) pending adjudication of 5:00-cv-223, motion to Dismiss t his a ction 5 :00-cv-223 for failure to state a claim and for lack of jurisdiction |
| January 12, 2001 | AFFIDAVIT of Albert Shemmy M ishaan o n b ehalf of The City of Sherrill. Re: In Opposition t o t he m otion to Stay action 5:00-cv-1106 (member case) pending adjudication o f 5 :00-cv-223, motion to Dismiss this action 5:00-cv-223 for failure to state a claim and |

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| | for lack of jurisdiction with Exhibits 1-5 attached. |
| January 12, 2001 | REPLY by David Garber, Esq on behalf of defendants Halbritter, George, Fougnier, John, Hill, Rood, Lynch, Phillips, Rodgers, Green, Burr, and Patterson to response to motion to Stay action 5:00-cv-1106 (member case) pending adjudication o f 5 :00-cv-223, motion to Dismiss this action 5:00-cv-223 for failure to state a claim and for lack of jurisdiction |
| January 30, 2001 | MEMORANDUM by Ira Sacks, Esq for City of Sherrill in support of motion for Summary Judgment, and motion for Preliminary Injunction |
| January 30, 2001 | Statement of Material Facts in Support of motion for Summary Judgment, motion for Preliminary Injunction filed by Ira Sacks, Esq for City of Sherrill |
| January 30, 2001 | AFFIDAVIT of David O. Barker on behalf of City of Sherrill. Re: In Support of |



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| | the defendant's motion for Summary Judgment, motion for Preliminary Injunction |
| January 30, 2001 | MEMORANDUM by Peter D. Carmen, Esq for Oneida Indian Nation in support of cross motion for Summary Judgment |
| January 30, 2001 | MEMORANDUM by Peter D. Carmen, Esq for Oneida Indian Nation in opposition to motion for Summary Judgment, motion for Preliminary Injunction (incorporated into Memo in Support of Motion). |
| January 30, 2001 | Statement of Material Facts in Support of cross motion for Summary Judgment filed by Peter D. Carmen, Esq for Oneida Indian Nation |
| January 30, 2001 | RESPONSE Statement of Material Facts in Opposition to the motion for Summary Judgment, motion for Preliminary Injunction filed by Peter D. Carmen, Esq for Oneida Indian Nation |
| January 30, 2001 | DECLARATION of Paul A. |

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| | Thomas, Jr., on behalf of Oneida Indian Nation. Re: In Support of plaintiff's cross motion for Summary Judgment |
| January 30, 2001 | AFFIDAVIT of Peter D. Carmen, Esq for Oneida Indian Nation. Re: In Support of plaintiff's cross motion for Summary Judgment, and In Opposition to the defendant's motion for Summary Judgment, or in the alternative the motion for Preliminary Injunction |
| January 30, 2001 | REPLY MEMORANDUM of LAW by Ira Sacks, Esq for City of Sherrill to response to motion for Summary Judgment, and the motion for Preliminary Injunction, and In Opposition to the plaintiff's cross motion for Summary Judgment |
| January 30, 2001 | Statement of Material Facts in Response to the plaintiff's cross motion for Summary Judgment filed by Ira Sacks, Esq for City of Sherrill |
| January 30, 2001 | REPLY AFFIDAVIT of Ira |



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| | S. Sacks, Esq for City of Sherrill. Re: In Opposition to the plaintiff's cross motion for Summary Judgment |
| January 30, 2001 | REPLY AFFIDAVIT of David O. Barker on behalf of City of Sherrill. Re: In Further Support of defendant's motion for Summary Judgment, motion for Preliminary Injunction |
| January 30, 2001 | REPLY by Peter D. Carmen, Esq for Oneida Indian Nation to City of Sherrill's response to cross motion for Summary Judgment |
| January 30, 2001 | REPLY AFFIDAVIT of Peter D. Carmen, Esq for Oneida Indian Nation. Re: In Further Support of the plaintiff's cross motion for Summary Judgment |
| February 6, 2001 | Scheduling Notice: Pending motions are adjourned from 2/23/01 to 3/9/01 at 10:"30 in Utica, NY. ORAL ARGUMENT IS MANDATORY |
| April 9, 2001 | TRANSCRIPT filed of |

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| | motion hearing for dates of March 9, 2001 held in Utica, NY before Judge Hurd. |
| June 4, 2001 | ORDER granting motion to Dismiss this action 5:00-cv-223 for failure to state a claim and for lack of jurisdiction, granting cross motion for Summary Judgment, denying motion for Summary Judgment, denying motion for Preliminary Injunction, denying motion to Amend answer, counterclaims against the Oneida Indian Nation of NY brought by the City of Sherrill in the lead case 00-cv-223 are DISMISSED, judgment on the pleadings in favor of the Oneida Indian Nation of NY and against Madison County is GRANTED in the Related Case 00-cv-506 Attorneys fees pursuant to 42 USC Section 1988 are DENIED; the properties at issue, known by tax identification as City of Sherrill parcels are Indian reservation land immune from state and local property taxation while in the possession of the Oneida |



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| | Indian Nation of NY, etc and the City of Sherrill, etc. are ENJOINED and RESTRAINED from taking any act to impose property taxes upon or to collect with respect to the properties known by tax identification numbers; Madison County, etc are ENJOINED and RESTRAINED from taking any act to impose or collect property taxes with respect to the properties known by tax identification numbers and clerk directed to enter separate judgments in each case in accordance with this Memorandum-Decision and Order ( signed by Judge David N. Hurd ) |
| June 4, 2001 | JUDGMENT for Oneida Indian Nation against City of Sherrill pursuant to the Memorandum Decision and Order of the Hon. David N. Hurd dated 6/4/01. |
| June 4, 2001 | Case closed |
| June 29, 2001 | NOTICE OF APPEAL by City of Sherrill from Order & Judgment entered 6/4/01. |

**Relevant Docket Entries, *City of Sherrill v. Oneida Indian Nation*, U.S. District Court, Northern District of New York, 00-CV-00327-DNH-GS**

| Filing Date | Docket Text |
|---|---|
| February 22, 2000 | NOTICE OF REMOVAL; from City Court of Sherrill |
| February 22, 2000 | COMPLAINT filed; copy of complaint filed. |
| March 6, 2000 | ANSWER to Complaint by Oneida Indian Nation |
| June 14, 2000 | ORDER, to Consolidate Cases, consolidating this action under 5:00-CV-223 and directing all further docketing to occur in civil action 5:00-CV-223, and further reassigning case 5:00-CV-223 to Mag/Judge Sharpe (signed by Magistrate Judge Gary L. Sharpe) |
| September 25, 2000 | ORDER transferring this case to Judge Hurd for all further proceedings. |
| June 4, 2001 | ORDER granting the Oneida Indian Nation of New York's motion for summary judgment and the petition for eviction is DISMISSED, etc. (signed by Judge David N. Hurd) |
| June 4, 2001 | JUDGMENT for Oneida Indian Nation against City of Sherrill pursuant to the Memorandum Decision and Order of the Hon. David N. Hurd dated 6/4/01. Petition for eviction is dismissed. |
| June 4, 2001 | Case closed |

**Relevant Docket Entries, *Oneida Indian Nation v. City of Sherrill, et al*, Second Circuit Court of Appeals, Docket 01-7795**

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|---|---|
| July 9, 2001 | Copy of notice of appeal and district court docket entries on behalf of Appellant City of Sherrill, filed. |
| December 3, 2001 | Appellant City of Sherrill, in 01-7795 brief filed |
| December 3, 2001 | Appellant City of Sherrill, in 01-7795 brief filed |
| December 10, 2001 | Amicus Curiae Oneida County in 01-7795, Madison County brief filed |
| December 10, 2001 | Appellant Madison County in 01-7795 defective Appellant's brief cured. |
| December 11, 2001 | Amicus Curiae State of New York in 01-7795 brief filed |
| January 18, 2002 | Appellee Oneida Indian Nation in 01-7795 brief filed |
| February 20, 2002 | Appellant City of Sherrill, Ne in 01-7795 reply brief filed |
| May 13, 2002 | Case heard before VAN GRAAFEILAND, MESKILL, B. PARKER, C.JJ |
| July 21, 2003 | Judgment of the district court is AFFIRMED & VACATED by published signed opinion filed. |



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| July 21, 2003 | Judge EVG DISSENTING in a separate opinion filed. |
| July 21, 2003 | Judgment filed. |
| July 30, 2003 | Appellant City of Sherrill, Petition for rehearing, petition for rehearing en banc |
| September 15, 2003 | Order FILED DENYING petition for REHEARING by Appellant City of Sherrill, endorsed on motion dated 7/30/03 and DENYING petition for rehearing in banc |
| October 10, 2003 | Judgment MANDATE ISSUED. |
| December 18, 2003 | Notice of filing petition for writ of certiorari for Appellant City of Sherrill, in 01-7795 dated 12/11/03 filed. Supreme Ct#: 03-855. |

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF NEW YORK**

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ONEIDA INDIAN NATION
Route 5
Vernon, New York 13476,

Plaintiff,

-vs- Civil Action No. _____

CITY OF SHERRILL
377 Sherrill Road
Sherrill, New York 13461,

Defendant.

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COMPLAINT

A. Nature of Action

1. The Oneida Indian Nation sues the City of Sherrill to stop Sherrill from further efforts to enforce its property tax laws with respect to Nation lands located in Sherrill. Sherrill has notified the Nation that, unless the Nation pays property taxes by February 8, 2000, Sherrill will take title to the Nation's lands and will evict the Nation from possession of such lands. These lands are Oneida reservation lands in the Nation's actual possession, are Indian country,

and are restricted against alienation. Sherrill's efforts to tax such lands and to interference with the Nation's possession of them violates federal law.

B. Subject Matter Jurisdiction and Venue

2. Jurisdiction regarding the Nation's federal claims exists pursuant to 28 U.S.C. §§ 1331 & 1362 and 42 U.S.C. § 1983. Those claims arise under, and seek to preserve rights and immunities secured by, the Indian Commerce Clause (Art. I, § 8) and the Due Process Clause (Amend. XIV) of the United States Constitution, the Non-Intercourse Act, 25 U.S.C. § 177, the 1794 Treaty of Canandaigua, and federal common law protections of tribal sovereignty and prohibitions against taxation of tribal reservation land by states and their political subdivisions.

3. Jurisdiction regarding the Nation's state-law claims exists pursuant to 28 U.S.C. § 1367. Sherrill is in this district. The events giving rise to the Nation's claims occurred in this district. The real property that is the subject of this action is in this district.

C. Parties

5. Plaintiff Oneida Indian Nation is a federally recognized Indian tribe. 63 Fed. Reg. 71941 (Dec. 30, 1998).

6. Defendant City of Sherrill is a municipal corporation organized under the laws of the State of New York.

D. Facts

7. The Nation has two properties fronting on Route 5 in Sherrill. On one, the Nation has a textile



manufacturing and distribution facility. On the other, the Nation has a gas station and convenience store. Sherrill has divided these properties into the following ten tax parcels. 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.014-1-26. 322.015-2-1, 322.015-2-64, 322.015-2-65, 322.015-2-40.3, 322-015-2-45.1, 322-015-2-47.

8. These properties are located within and are part of the Oneida reservation recognized in the 1794 Treaty of Canandaigua. Neither the Congress of the United States, nor any other part of the Government of the United States, ever has modified the reservation status of these properties or made them subject to taxation by a state or local government.

9. Although the Nation's properties in Sherrill always have been part of the Oneida reservation, the Nation has not always had actual possession of them. In 1805, the State of New York caused these properties, which were part of a 100-acre parcel, to be transferred to an individual Nation member named Cornelius Dockstader. In 1807, the New York Legislature purported to grant Dockstader the right to sell the land, and Dockstader thereafter sold the land to a non-Indian named Peter Smith. Thereafter, the land was subdivided. The subdivided parcels, including the properties that are the subject of this action, were sold by one non-Indian to another over the years, such that, from 1805 until about 1997-98, the parcels were out of the Nation's actual possession.

10. None of the transactions, transfers or sales described in the previous paragraph complied with any of the federal participation and approval requirements of 25 U.S.C. § 177, and none was approved by any branch of the Government of the United States. All such transactions and transfers were in violation of federal law and were void ab

initio, including the transactions and transfers involving the Sherrill properties, and the Nation never lost its possessory rights with respect to the Sherrill properties.

11. In 1997 and 1998, the Nation re-acquired actual possession of its properties in Sherrill by voluntary, free market transactions. Pursuant to these transactions, those non-Indians who were in actual possession agreed to leave and to give to the Nation possession and any other rights they had claims in the properties.

12. The Nation's properties constitute reservation land and, therefore, Indian country within the meaning of 18 U.S.C. § 1151. Further, the properties are subject to restrictions on alienation and encumbrance by virtue of the Non-Intercourse Act, 25 U.S.C. § 177. As reflected in Exhibit A, the United States Department of Interior has reviewed the status of a gas station on similar lands and has determined in response to an inquiry from the New York State Police that the lands "are owned by the Oneida Tribe of New York, cannot be alienated without the express approval of the United States, and are subject to Oneida tribal governmental power."

13. Notwithstanding the status of the Nation's properties as described in the previous paragraph, Sherrill, acting under color of state law, has sought to collect property taxes from the Nation with respect to its properties. The Nation has refused to pay those taxes on the ground that Sherrill's imposition of the taxes is illegal under federal law. The Nation has proposed a standstill agreement that would avoid the need for immediate litigation, without prejudice to the legal positions of the parties. Sherrill has ignored the Nation's objections, has rejected a standstill agreement, and



has purported to auction the Nation's properties, which Sherrill itself has claimed to purchase at auction.

14. Sherrill is now seeking to bring the dispute to an immediate culmination by engaging in self-help and evicting the Nation from its properties. Specifically, Sherrill has notified the Nation that it will be evicted from three of the tax parcels if property taxes are not paid by February 8, 2000. As to each of these parcels, Sherrill's notice was in the form attached as Exhibit B. It states:

> In accordance with Section 94.h of the City Charter, your property will be conveyed to the City of Sherrill on February 8, 2000, if you do not redeem this property by the date specified in the enclosed notice.
>
> After the execution of the conveyance to the City, the Charter provides that the occupants of such land be removed therefrom and possession thereof delivered to the City.

E. First Claim; Federal Prohibition of Property Taxation and Eviction

15. Paragraphs 1 through 14, above, are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

16. The Nation's properties in Sherrill (specifically identified in paragraph 7, above) are in the actual possession of the Nation, and the Nation has had a possessory right to those properties from time immemorial.

17. The Nation's properties are within the Oneida reservation that was confirmed and guaranteed by the 1794 Treaty of Canandaigua. The Treaty confirms the Nation's possessory right and guarantees the Nation the "free use and enjoyment" of its reservation. It precludes taxation of the Nation's reservation land.

18. The Nation's properties constitute reservation land and are Indian country within the meaning of 18 U.S.C. § 1151.

19. The Nation's properties are subject to the restrictions against alienation imposed by the Non-Intercourse Act, 25 U.S.C. § 177.

20. The Nation's properties in Sherrill are not subject to taxation by Sherrill. Article I, Section 8 of the United States Constitution reposes authority over commerce with Indians in the Congress of the United States. This authority is exclusive, it preempts the authority of states and their political subdivisions to impose taxes on tribal land within Indian country, including reservation land possessed by an Indian tribe. Further, in the absence of Congressional authorization to impose such taxes, efforts by states and their political subdivisions to do so is a violation of an Indian tribe's sovereign immunity.

21. Sherrill's efforts to impose property taxes on the Nation's properties and to coerce payment of these taxes by the Nation by encumbering and conveying those properties and by eviction the Nation from them:

a. violate the 1794 Treaty of Canandaigua;

b. violate Article I, Section 8 of the United States Constitution and federal



common law, which give exclusive authority to Congress with respect to taxation of Indian land;

c. violate the Nation's sovereign immunity, which derives from Article I, Section 8 of the United States Constitution and from federal common law.;

d. violate the Non-Intercourse Act, 25 U.S.C. § 177, in that Sherrill has not complied with any provision of the Act for federal involvement in and approval of a conveyance of an interest in the Nation's properties or of eviction of the Nation from them; and

e. violate 42 U.S.C. § 1983, in that, under color of state law, they deprive the Nation of rights, privileges and immunities secured by the United States Constitution and by the laws of the United States.

22. Accordingly, Sherrill has no right to tax, auction, transfer or sell the Nation's properties or to evict the Nation from its properties in Sherrill, and Sherrill's action are null and void.

F. Second Claim: Federal and State Due Process

23. Paragraphs 1 through 14, above, are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

24. Throughout Sherrill's efforts, taken under color of state law, to enforce its property tax laws with respect to the Nation's properties, Sherrill has failed to provide the Nation with the notices required to afford due process under the laws of the United States and under the laws of the State of New York.

25. Sherrill's initial notices of tax delinquency to the Nation referred to a tax delinquency but failed to identify the properties subject to the claimed delinquency.

26. Sherrill failed to serve the Nation with written notice with respect to Sherrill's tax sales of the Nation's properties that occurred on November 5, 1997, November 5, 1998 and November 10, 1999. Instead, Sherrill relied upon notice by publication, which was not sufficient.

27. Sherrill also failed to provide the Nation with two years' notice of the Nation's right to redeem its properties, although the Sherrill Charter provides for a two-year redemption period. Instead, Sherrill gave the Nation only three months' notice of its right to redeem, threatening to evict the Nation at the end of that three-month period. This belated notice of a truncated redemption period eliminated twenty-one months of the required two-year redemption period.

28. By virtue of the foregoing notice defects, Sherrill's efforts to deprive the Nation of its properties and to evict the Nation from them deprives the Nation of the due process rights secured by the constitution and laws of the United Stats and the laws of New York and are illegal, void and in violation of 42 U.S.C.§ 1983.

G. Prayer for Relief



WHEREFORE, the Nation prays for entry of judgment in its favor and against Sherrill, awarding the Nation:

a. a declaration that Sherrill may not impose or seek to collect property taxes from the Nation based on the lands owned and possessed by the Nation within Sherrill, that the Nation and its lands are not subject to property taxation by Sherrill, that all of Sherrill's efforts heretofore to tax such lands are null and void, that all of Sherrill's purposed conveyances, sales and auctions of – and notices of delinquency and liens on – such lands are null and void, that all of Sherrill's efforts to interfere with the Nation's ownership and possession of such land are null and void, and that Sherrill may not evict the Nation from or dispossess the Nation of its lands;

b. an injunction prohibiting Sherrill, its officers, agents, servants, employees and persons in active concert or participation with them, including Mayor Dwight Evans, City Manager David Barker and City Clerk Michael Holmes, from subjecting the Nation and its lands to property taxation, prohibiting them from any interference with the Nation's ownership and possession of its lands and from any effort to evict the Nation from such lands, and mandating that they void and rescind all notices, liens, sales, auctions, conveyances and other officials documents or acts taken with respect to enforcement of the property tax laws as against the Nation and its lands;

c. attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

d. such other relief to which the Nation may be entitled at law or inequity.

Dated: February 4, 2000 Respectfully submitted,

MACKENZIE SMITH LEWIS MICHELL & HUGHES, LLP
BY:_____
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P.O. Box 4967
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-and-

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Attorneys for Plaintiff Oneida Indian Nation



**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**
**Eastern Area Office**
**Suite 260**
**3701 North Fairfax Drive**
**Arlington, Virginia 22203**

**March 17, 1999**

Mr. Lloyd R. Wilson, Jr.
Staff Inspector
New York State Police
Building 22
1220 Washington Avenue
Albany, New York 12226-2252

Dear Inspector Wilson

Thank you for your letter asking whether lands owned by the Oneida Tribe of New York (specifically the SavOn gas station at 354 N. Peterboro Street, Canastota, New York) are "Indian lands" as defined under 25 U.S.C. 2703.

Section 2703(4)(B) provides in pertinent part that Indian lands are "any lands title to which is … held by any Indian tribe … subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

The lands in question meet this definition because they are owned by the Oneida Tribe of New York, cannot be alienated without the express approval of the United States, and are subject to Oneida tribal governmental power.

Should you have any further questions, please let me know.

Sincerely,

Franklin Keel
Director, Eastern Area



**CITY OF SHERRILL**
**377 Sherrill Rd.**
**Sherrill, N.Y. 13461**
**Telephone: (315) 363-2440**
**Fax: (315) 363-0031**

**CITY OF SHERRILL**

**NOTICE OF REDEMPTION**

**FROM 1997**

To: Oneida Indian Nation of New York
Tax Map # 322.014-1-26

PLEASE TAKE NOTICE that a sale of said lands, reputedly owned by you, for unpaid taxes was held by the undersigned on November 5, 1997, such lands were sold to the City of Sherrill, the highest bidder, and a tax sale certificate issued to the City. The last date for you to redeem such lands is February 8, 2000.

Dated: November 8, 1999

MICHAEL D. HOLMES
CITY CLERK

**CITY OF SHERRILL**
**377 Sherrill Rd.**
**Sherrill, N.Y. 13461**
**Telephone: (315) 363-2440**
**Fax: (315) 363-0031**

January 10, 2000

Oneida Indian Nation of New York
Attn: Ray Halbritter
P.O. Box 1
Vernon, N.Y. 13476

Dear Mr. Halbritter:

In accordance with Section 94.h of the City Charter, your property will be conveyed to the City of Sherrill on February 8, 2000, if you do not redeem this property by the date specified in the enclosed notice.

After the execution of conveyance to the City, the Charter provides that the occupants of such land be removed therefrom and possession thereof delivered to the City.

Sincerely,

Michael D. Holmes
City Clerk



**ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER, L.L.P.**
**Attorneys at Law**
**1201 Connecticut Avenue, N.W.**
**Washington, D.C. 20036-2636**
**(202) 778-1800**
**Telecopier**
**(202) 822-8106**

February 4, 2000

**VIA FACSIMILE & FIRST CLASS MAIL**

Mr. Michael D. Holmes
City Clerk
City of Sherrill
377 Sherrill Road
Sherrill, MY 13461

Dear Mr. Holmes:

I am writing to request that the City's counsel contact me about the tax case just filed in federal court by the Oneida Indian Nation.

I would like to pursue with counsel our request for a standstill agreement that would not prejudice the legal position of any party.

I also would like to confirm our expectation that the City of Sherrill will not take further action to evict the Nation while the federal litigation concerning the rights of Sherrill and the Nation is pending.

Finally, I would ask that copies of any further notices concerning this matter also be sent to me. Thank you.

Sincerely,

/s/ Michael R. Smith

Michael R. Smith



**Answer and Counterclaims, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), February 24, 2000**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| THE ONEIDA INDIAN NATION,<br>Route 5<br>Vernon, New York 13476,<br><br>Plaintiff,<br>vs.<br><br>CITY OF SHERRILL,<br>377 Sherrill Road<br>Sherrill, New York 13461,<br><br>Defendant. | : | ANSWER AND COUNTERCLAIMS<br>Civil Action No.<br>00-CV-223 |

Defendant the City of Sherrill, by its attorneys, Fried, Frank, Harris, Shriver & Jacobson, as and for its answer and counterclaim, states and alleges upon knowledge as to itself and upon information and belief as to all other matters, as follows:

1. Denies each and every allegation of paragraph 1 of the complaint, except admits the City of Sherrill notified the Oneida Indian Nation that, unless it paid its property taxes on tax parcels 322.014-1-23, 322.014-1-25, and 322.014-1-26 by February 8, 2000, Sherrill would take title to these lands and evict plaintiff from possession of said lands.

2. Denies each and every allegation of paragraph 2 of the complaint, except admits that plaintiff purports to

predicate its claims and assertions as to jurisdiction upon the statutes and legal principles referred to therein.

3. Denies each and every allegation of paragraph 3 of the complaint, except admits that plaintiff purports to predicate its claims and assertions as to jurisdiction upon the statutes and legal principles referred to therein.

4. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 4 of the complaint, except admits that the City of Sherrill is located within the Northern District of New York and admits that the real property that is the subject of this action is located within the Northern District of New York.

5. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 5 of the complaint, except admits that the Oneida Indian Nation is a federally recognized Indian tribe.

6. Admits the allegations of paragraph 6 of the complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 7 of the complaint, except admits that these properties have been divided by the Oneida County Department of Taxation into the following ten tax parcels: 322.014-1-23; 322.014-1-24; 322.014-1-25; 322.014-1-26; 322.015-2-1; 322.015-2-40.3; 322.015-2-45.1; 322.015-2-47; 322.015-2-64; 322.015-2-65; except denies that the properties referred to as tax parcels 322.014-1-23, 322.014-1-25, and 322.014-1-26 are currently owned by the Oneida Indian Nation.

8. Denies each and every allegation of paragraph 8 of the complaint.



9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 9 of the complaint, except denies that plaintiff currently owns the Sherrill properties referred to as tax parcels 322.014-1-23, 322.014-1-25, and 322-014-1-26, and denies that any of the ten tax parcels enumerated in full in paragraph 7 always have been a part of the Oneida reservation, except admits that the Oneida Indian Nation has not always had possession of these properties.

10. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 10 of the complaint, except denies that since 1805 the sale of all Sherrill properties described in paragraph 9 of the complaint were in violation of federal law and were void ab initio, and denies that plaintiff never lost its possessory rights with respect to said properties.

11. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 11 of the complaint, except denies that plaintiff re-acquired actual possession of its own properties.

12. Denies each and every allegation of paragraph 12 of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Exhibit A and respectfully refers any legal issues purportedly raised by Exhibit A to the Court.

13. Denies each and every allegation of paragraph 13 of the complaint, except admits that Sherrill has sought to collect property taxes from the Oneida Indian Nation with respect to its current and former properties and that the Oneida Indian Nation has refused to pay those taxes.

14. Denies each and every allegation contained in paragraph 14 of the complaint, except admits that defendant sent plaintiff notices in the form and language of that specified in paragraph 14, and admits that Sherrill is seeking to evict the Oneida Indian Nation from the properties referred to as tax parcels 322.014-1-23, 322.014-1-25, and 322.014-1-26, which properties were formerly owned by it.

ANSWERING THE FIRST CLAIM OF THE COMPLAINT

15. Answering paragraph 15 of the complaint, repeats and realleges each of its responses to paragraph 1 through 14 of the complaint as if fully set forth herein.

16. Denies each and every allegation of paragraph 16 of the complaint, except admits plaintiff is wrongful possession of the properties referred to therein.

17. Denies each and every allegation of paragraph 17 of the complaint, and respectfully refers the document referenced therein and any issues of law raised by it to the Court.

18. States that paragraph 18 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation in paragraph 18 of the complaint.

19. States that paragraph 19 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation in paragraph 19 of the complaint.

20. States that paragraph 20 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation in paragraph 20 of the complaint.



21. States that paragraph 21 of the complaint contains only legal conclusions as to which no responsive pleading is required, and otherwise denies each and every allegation of paragraph 21 of the complaint.

22. Denies each and every allegation of paragraph 22 of the complaint.

ANSWERING THE SECOND CLAIM OF THE COMPLAINT

23. Answering paragraph 23 of the complaint, repeats and realleges each of its responses to paragraphs 1 through 22 of the complaint as if fully set forth herein.

24. Denies each and every allegation of paragraph 24 of the complaint.

25. Denies each and every allegation of paragraph 25 of the complaint.

26. Denies each and every allegation of paragraph 26 of the complaint.

27. Denies each and every allegation of paragraph 27 of the complaint.

28. Denies each and every allegation of paragraph 28 of the complaint.

COUNTERCLAIMS AGAINST PLAINTIFF

29. Counterclaim Plaintiff the City of Sherrill ("Sherrill") repeats and realleges each of its responses to paragraph 1 through 28 of the complaint as if fully set forth herein.

30. On or about February 7, 1997, Counterclaim Defendant the Oneida Indian Nation purchased the following three tax parcels in Sherrill: 322.014-1-23, 322,014-1-25, and 322.014-1-26 (collectively, the "Foreclosed Property"). Later, Counterclaim Defendant purchased seven additional tax parcels in Sherrill: tax parcels 322.015-2-64 and 322.015-2-65 were purchased on June 3, 1997; tax parcel 322.014-1-24 was purchased on June 10, 1997; tax parcel 322.015-2-1 was purchased on October 1, 1997; and tax parcels 322.015-2-40.3, 322.015-2-45.1, and 322.015-2-47 were purchased on August 31, 1998 (collectively, the "Additional Property"). The Foreclosed Property and the Additional Property were neither reservation land nor Indian country.

31. Sherrill's City Charter specifically requires that all property owners in Sherrill pay property taxes and that the city clerk shall collect such taxes. Once Counterclaim Defendant purchased the Foreclosed Property and the Additional Property, it was legally obligated, just like all other Sherrill property owners, to pay property taxes. From the time Counterclaim Defendant owned the Foreclosed Property and the Additional Property, however, it has steadfastly refused to pay property taxes, in violation of Sherrill law.

32. Pursuant to Section 94 of Sherrill's Charter, the city clerk caused to be published a notice in The Oneida Daily Dispatch newspaper on February 28, 1997, to all Sherrill residents regarding their tax bills. The notice stated that the taxes could be paid to the city clerk at his office within thirty days from the publication of the first notice with no fee, and that the said taxes could also be paid during the next sixty days after the expiration of the first thirty days with a payment of a fee of two cents upon the dollar of tax and that after the expiration of ninety days from the first



publication of such notice such tax would become delinquent and would bear interest.

33. Additionally, on February 28, 1997, Sherrill sent tax bills to its residents. Enclosed with the tax bill was a notice setting forth the same payment schedule as that published in The Oneida Daily Dispatch. Counterclaim Defendant did not pay any of its taxes on the Foreclosed Property or the Additional Property within ninety days of the publication or of receiving its bill. The taxes on those properties then become delinquent.

34. Pursuant to Section 94-a of Sherrill's Charter, after the expiration of ninety days from the first publication of the notice described above, the city clerk served Counterclaim Defendant by mail on or about August 7, 1997, a written notice requiring it to pay the delinquent taxes. Although the Sherrill Charter requires payment within ten days of the service of such notice, Sherrill afforded the counterclaim defendant until September 2, 1997, or 26 days, to tender payment. This is the only demand of payment of the delinquent tax required under the law.

35. Pursuant to Section 94-b of the Sherrill Charter, whenever tax, penalty or interest, or any part of either of them, shall remain unpaid on the first day of August, the city clerk may proceed to advertise and sell the lands upon which the same was imposed for the payment of such tax, penalty or interest, or the part that remains unpaid. By September 16, 1997, one month longer than the statute required, there still was no payment by Counterclaim Defendant of its taxes, penalty or interest, and the city clerk proceeded to advertise the sale of the Foreclosed Property.

36. Section 94-c of the Charter requires that, when the city clerk proceeds to advertise the sale of lands for unpaid taxes, he must caused to be published a notice of the

sale containing a description of the lands to be sold and specifying the time and place of the sale in the official newspaper of Sherrill, once a week for at least six consecutive weeks, immediately prior to the day of the sale. The Sherrill Charter also requires the city clerk to post such notice of the sale in at least three public places in the city at least forty-two days before the day of the sale. Accordingly, Sherrill's city clerk published notice of the sale once a week for seven consecutive weeks, on or about September 17 and 24, 1997, and October 1, 8, 15, 22, and 29, 1997, and advertised and published notice of the sale of the Foreclosed Property in The Oneida Daily Dispatch, and posted such notice at Sherrill City Hall, the Sherrill Police Station, and the Sherrill Post Office on September 17, 1997, in accordance with Section 94-b of the Charter.

37. Counterclaim Defendant never paid taxes on the Foreclosed Property. In compliance with Section 94-d of Sherrill's Charter, the Foreclosed Property was sold to Sherrill at a public auction held on November 5, 1997. Pursuant to Section 94-f of the Charter, Counterclaim Defendant had two years from the date of the sale to redeem the Foreclosed Property by paying all taxes, penalty and interest owed on the Foreclosed Property. It never did.

38. In addition, Section 94-g of the Charter requires that, before the redemption period runs out, even if it is longer than the two year statutory minimum, the city clerk must also commence the publication of the notice of the redemption from the sale, which shows the year when the sale took place, and the last day for the redemption of the property, without other or further description, and such notice shall be published at least twice in three months in the official newspaper of the city. Accordingly, the city clerk published such notice in The Oneida Daily Dispatch on November 8, 1999, December 8, 1999, and January 7, 2000.



39. Section 94-g also requires that a copy of the notice be served personally on the owner or the occupant of the property, or, if unoccupied, posted on the premises at least twenty days before the expiration of the redemption period. Accordingly, for tax parcel 322.014-1-23 such service was made on both William Hervey, whose title is the Director of Intergovernmental Relations for the Oneida Indian Nation, and Kathy Perham, the Executive Assistant to the General Manager of the Oneida Textile Designs, on January 10, 2000. For tax parcels 322.014-1-25 and 322.014-1-26, a copy of the notice was posted on each of the unoccupied parcels.

40. Prior to the expiration of the redemption period on February 8, 2000, Sherrill made on final attempt to resolve the tax dispute with Counterclaim Defendant. Sherrill wrote a letter to Counterclaim Defendant on February 8, 2000, suggesting that it could pay its taxes under protest. Such a payment would have clearly enabled it to retain possession of the Foreclosed Property and preserve its legal options to contest such payment. Counterclaim Defendant rejected this suggestion, and did not pay the taxes owed prior to the expiration of the redemption period.

41. On February 9, 2000, pursuant to section 94-h of the Charter, Sherrill received a conveyance of the Foreclosed Property, and is recorded as the owner of the Foreclosed Property on the deed located at the Oneida County Clerk's Office. Counterclaim Property remains in wrongful possession of the property, on which it runs a retail outlet as well as a factory that prints silkscreens on clothing. On February 15, 2000, Sherrill commenced eviction proceedings in the City Court of Sherrill.

42. Although Counterclaim Defendant has not paid its property taxes, it has received and continues to receive valuable municipal benefits provided to all property

owners in Sherrill. These benefits include police and fire protection, garbage removal, road maintenance, and zoning enforcement and planning.

43. Counterclaim Defendant has never paid any part of the property taxes it owes on the Foreclosed Property or the Additional Property. If the counterclaim defendant purchases additional real property in the City of Sherrill, it will likewise refuse to pay property taxes on any newly-acquired property and, consequently, the amount of money the City of Sherrill receives in property taxes will be significantly diminished. As a result, the City of Sherrill's law abiding, tax-paying citizens will suffer as the quality and availability of municipal services decrease.

FIRST COUNTERCLAIM

(Declaratory Judgment)

44. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

45. The Foreclosed Property and the Additional Property are within the City of Sherrill, located in the State of New York and are a part of the United States of America. As such, any property owner of the Foreclosed Property and the Additional Property must abide by all applicable local, state, and federal laws, including the payment of local property taxes. The local property tax law is codified in Sections 90 – 98 of the Sherrill City Charter, which sections set forth the procedures by which residents owning real property in Sherrill shall be assessed and shall pay property taxes.

46. Counterclaim Defendant is in violation of Sherrill's local property tax law, as codified in Sherrill's Charter, due to its failure to pay local property taxes.



47. Counterclaim Plaintiff Sherrill therefore requests a declaration that Sherrill may lawfully impose and seek to collect property taxes from Counterclaim Defendant on the properties it once owned (the Foreclosed Property), it now owns (the Additional Properties), or it may own in the future, and that appear on the tax rolls of Sherrill.

48. Counterclaim Plaintiff Sherrill further requests a declaration that Sherrill's Charter applies to all such properties described in paragraph 47, above.

SECOND COUNTERCLAIM

(Eviction)

49. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

50. Pursuant to the Section 94 of the Sherrill Charter, the Foreclosed Property is currently owned by Sherrill and Sherrill has a possessory right to the Foreclosed Property.

51. Because Counterclaim Defendant did not pay the property taxes on the Foreclosed Property in the time prescribed within the Sherrill Charter, it has lost all property rights with respect to the Foreclosed Property. Accordingly, Counterclaim Defendant has no right to remain on the Foreclosed Property, or act as if the Foreclosed Property in any way belongs to it.

52. Counterclaim Plaintiff Sherrill therefore requests a judgment evicting the counterclaim defendant from the Foreclosed property.

THIRD COUNTERCLAIM

(Unjust Enrichment)

53. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

54. The money Sherrill collects in property taxes is used to fund a number of municipal services which benefit the entire community. Sherrill's city managers and department heads initially determine how much money should be allocated for each of the municipal services provided to Sherrill residents. Thereafter, Sherrill's city commissioners must approve the budget and a public hearing must be held before the budget is finalized. The timely collection of property taxes by Sherrill is crucial in order to ensure that municipal service programs are adequately funded.

55. Sherrill residents who own real property are obligated by the Sherrill Charter to pay property taxes each year. In return, those residents receive the benefits of a plethora of municipal services, such as police and fire protection, garbage removal, road maintenance, and zoning enforcement and planning.

56. Notwithstanding the fact that Counterclaim Defendant refuses to pay the property taxes it owes on either Foreclosed Property or Additional Property in Sherrill, it nonetheless accepts, without objection, the services that Sherrill provides to it. As a result of Counterclaim Defendant's conduct described above, Counterclaim Defendant has been, and continues to be, enriched at the expense of Sherrill's citizens.

57. Counterclaim Plaintiff Sherrill therefore requests a judgment in an amount to be determined at trial to



reimburse Sherrill for services provided to Counterclaim Defendant but not paid for by it via property taxes.

FOURTH COUNTERCLAIM

(Injunction)

58. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as it fully set forth herein.

59. Counterclaim Defendant has never paid the property taxes it owes to Sherrill on either the Foreclosed Property or the Additional Property. Furthermore, it is

apparent that should Counterclaim Defendant acquire additional property in Sherrill, it will likewise refuse to pay property taxes on the newly-acquired property. If Counterclaim Defendant is allowed to purchase additional property in Sherrill without paying taxes, the quality of life of law-abiding, tax-paying citizens of Sherrill will irreparably suffer due to a decrease in property tax revenue by Sherrill and the corresponding negative effect such a decrease in revenue will have on the quality and availability of critical municipal services. This injury is not compensable in money damages and Counterclaim Plaintiff has no adequate remedy at law.

60. Counterclaim Plaintiff Sherrill, therefore, requests a preliminary and permanent injunction prohibiting Counterclaim Defendant from purchasing additional properties, any part of which are located within the boundaries of Sherrill.

FIFTH COUNTERCLAIM

(Injunction)

61. Counterclaim Plaintiff Sherrill repeats and realleges paragraphs 29 through 43 with the same force and effect as if fully set forth herein.

62. On February 9, 2000, pursuant to section 94-h of the Charter, Sherrill received a conveyance of the Foreclosed Property, and is recorded as the owner of the Foreclosed Property on the deed located at the Oneida County Clerk's Office. Counterclaim Defendant remains in wrongful possession of the property, on which it runs a retail outlet as well as a factory that prints silkscreens on clothing. On February 15, 2000, Sherrill commenced eviction proceedings in the City Court of Sherrill.

63. If Counterclaim Defendant is permitted to build and/or expand upon the existing building structure, or erect new structures on the Foreclosed Property, the quality of life for law-abiding, tax-paying citizens of Sherrill will necessarily suffer when resources that would otherwise be utilized to provide critical services to those citizens will be used to correct the unauthorized expansion discussed above once Sherrill evicts Counterclaim Defendant and takes possession. This injury is not compensable in money damages and counterclaim plaintiff has no adequate remedy at law.

64. Counterclaim Plaintiff Sherrill, therefore, requests a preliminary and permanent injunction prohibiting Counterclaim Defendant from expanding and/or building upon the existing structure of the Foreclosed Property, and/or erecting new structures on said property.

REQUEST FOR RELIEF

65. Wherefore, Counterclaim Plaintiff the City of Sherrill respectfully requests that the Court enter judgments:



(a) dismissing the complaint;

(b) declaring that Sherrill may lawfully impose or seek to collect property taxes from Counterclaim Defendant based on the lands that appear on the tax rolls of Sherrill and that Sherrill's Charter applies to such properties, and declaring that Sherrill currently owns the Foreclosed Property;

(c) evicting Counterclaim Defendant from the Foreclosed Property;

(d) awarding an amount to Counterclaim Plaintiff, to be determined at trial, to reimburse it for Counterclaim Defendant's use and benefit of municipal services;

(e) preliminarily and permanently enjoining Counterclaim Defendant, its officers, agents, servants, employees and persons in active concert with it from purchasing any additional property within the boundaries of Sherrill;

(f) preliminarily and permanently enjoining Counterclaim Defendant, its officers, agents, servants, employees and persons in active concert with it from expanding or adding additional structures on the Foreclosed Property;

(g) attorneys' fees and costs; and

(h) such other and further relief which the court deems just and proper.

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Respectfully submitted,

Dated: February 24, 2000
New York, New York

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)

By: _____
Charles G. King
Bar Roll No. 509851
(For the Firm)
One New York Plaza
New York, New York 10004-1980
(212) 859-8000
(212) 859-4000 (Facsimile)

Attorneys for the City of Sherrill
Of Counsel
Laura Sulem (admission pending)

CERTIFICATE OF SERVICE

I certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that on February 24, 2000 I caused to be served upon the following by First Class U.S. Mail, postage prepaid, a true copy of the attached Answer and Counterclaim by Defendant City of Sherrill:

Mackenzie Smith Lewis Michell & Hughes, LLP
Peter D. Carmen
101 South Salina Street, Suite 600



P.O. Box 4967
Syracuse, New York 13221-4967
Telephone: (315) 233-8386
Facsimile: (315) 426-8358

-and-

Zuckerman, Spaeder, Goldstein, Taylor & Kolker, LLP
William W. Taylor, III
Michael R. Smith
1201 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 778-1832
Facsimile: (202) 822-8106

Attorneys for Plaintiff Oneida Indian Nation

Dated: New York, New York
February 24, 2000

/s/ Laura Sulem
Laura Sulem

**Reply to Counterclaims, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), March 14, 2000**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ONEIDA INDIAN NATION,

Plaintiff. Civil Action No.
00-CV-223 (NPM/GJD)

v.

CITY OF SHERRILL,

Defendant.

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REPLY TO COUNTERCLAIMS

Plaintiff Oneida Indian Nation, by counsel and pursuant to Fed. R. Civ. P. 12(a)-(b), submits this reply to the counterclaims filed by defendant City of Sherrill.

A. Preliminary Statement

1. Plaintiff denies that defendant is entitled to tax or to take plaintiff's land, to receive damages for the non-receipt of taxes or to prohibit plaintiff from the possession and development of land. Plaintiff has acquired possession of its lands in Sherrill from willing sellers for fair market value and thus is in possession of lands reserved to it by long-standing federal treaties. These lands are restricted against alienation by 25 U.S.C. § 177 and are Indian Country within the meaning of federal law. Congress never authorized the taxation of these lands, their



alienation from plaintiff, any change in their reservation status or any change in plaintiff's right to possess them. Thus, federal law forbids state and local taxation of these lands, and Sherrill is obligated to comply with this federal law. Plaintiff's tax immunity notwithstanding, plaintiff makes Silver Covenant Chain payments, usually far exceeding any taxes in dispute, and also makes payments for services, but defendant will not request or accept such payments because they are not labeled as tax payments and, accordingly, defendant has deprived Sherrill citizens of the benefits of these funds.

B. Specific Responses to Numbered Paragraphs in Counterclaims

2. Paragraph 29 incorporates paragraphs 1 through 28 of defendant's answer and, therefore, does not contain allegations requiring admission or denial. To the extent that paragraph 29 alleges that defendant is entitled to tax plaintiff's lands and to affect plaintiff's ownership of or right to possess those lands, that allegation is denied. To the extent that paragraph 29 contains any other allegations, those allegations are denied.

3. Plaintiff admits that it entered into transactions to reacquire actual possession of its properties but otherwise denies the allegations in paragraphs 30.

4. Plaintiff admits the allegations in paragraph 31 that the Nation has refused to pay property taxes and that defendant's Charter sets forth a property tax and enforcement scheme. Plaintiff denies that the Charter addresses or applies to taxation of Indian lands and denies that it requires plaintiff to pay property taxes. Plaintiff denies all other allegations in paragraph 31.

5. Plaintiff is without sufficient information to admit or deny the allegations in paragraph 32; further, the alleged publication, if it exists, speaks for itself. Plaintiff denies that defendant was authorized to take the acts alleged with respect to plaintiff.

6. Plaintiff admits the allegation in paragraph 33 that it has not paid property taxes. Plaintiff denies the allegation that it owed or owes property taxes and that it is delinquent with respect to such taxes. Plaintiff is without sufficient information to admit or deny the allegations in paragraph 33 concerning the contents of the alleged notice, which speaks for itself, or concerning the recipients of that notice.

7. Plaintiff admits the allegation in paragraph 34 that defendant mailed a notice, which speaks for itself, but denies that the notice complied with applicable law. Plaintiff denies the allegation of delinquency and denies that defendant was authorized to take any of the acts alleged.

8. Plaintiff denies any allegation in paragraph 35 that defendant was authorized to take the actions alleged. As for the contents of the Charter, it speaks for itself. Plaintiff admits the allegation in paragraph 35 that plaintiff did not pay property taxes but denies that any were owed and denies that there was a delinquency. Plaintiff is without sufficient information to admit or deny the allegation concerning the action of the City Clerk.

9. With respect to the allegations in paragraph 36, plaintiff denies that defendant was authorized to take the acts alleged. Regarding the content of the Charter, it speaks for itself. Plaintiff denies that defendant complied with applicable law concerning notice and is without sufficient information to admit or deny the allegations concerning defendant's efforts at publication.



10. Plaintiff admits the allegation in paragraph 37 that it has not paid property taxes but denies that it owed or owes property taxes and denies that defendant had authority to take the acts alleged. Plaintiff denies any allegation in paragraph 37 that the City of Sherrill provided plaintiff with the requisite notice of a two-year redemption period. Plaintiff denies the allegation in paragraph 37 that defendant complied with its Charter, which speaks for itself.

11. Plaintiff is without sufficient information to admit or deny the allegation in paragraph 38 concerning publication. As for the allegation about the contents of the Charter, it speaks for itself. Plaintiff denies that defendant provided the requisite notice of the redemption period and denies that defendant had authority to take any of the acts alleged.

12. Plaintiff admits that defendant provided notice to the persons and at the places alleged in paragraph 39 but denies that the content or service of the notice complied with defendant's Charter or with state and federal law. Plaintiff denies that the properties were unoccupied and denies that defendant personally served the owner or occupant of the properties. As to allegations about the contents of the Charter, it speaks for itself. Plaintiff admits that William Hervey was Director or Intergovernmental Relations and that Kathy Perham was Executive Assistant to the General Manager of Oneida Textile Designs but denies that either was the owner or occupant of the property. Plaintiff denies that defendant had authority to take any of the acts alleged.

13. Plaintiff denies any allegation in paragraph 40 that property taxes were owed. Plaintiff admits that defendant's counsel sent a letter concerning a payment of taxes under protest. To the extent that defendant alleges in paragraph 40 that plaintiff did not respond with a proposal to maintain the status quo pending federal litigation of

defendant's taxation authority, that allegation is denied. The allegation that plaintiff did not pay taxes, under protest or otherwise, is admitted.

14. Plaintiff admits the allegation in paragraph 41 that the Oneida County Clerk recorded defendant as the owner of the properties in furtherance of defendant's illegal tax enforcement efforts. Plaintiff denies that any acts of defendant or of the Oneida County Clerk were valid or lawful or that they had authority to take any of these acts. Plaintiff denies that it is in wrongful possession of the properties and that defendant is entitled to ownership or possession of them. Plaintiff admits that defendant commenced the referenced eviction proceeding but denies that it did so on February 15, 2000. Plaintiff admits that it operates a retail outlet and a textile design facility on the properties in question, taken as a whole.

15. Plaintiff admits that it has not paid property taxes and denies any allegation in paragraph 42 that any such taxes have been or are due. Plaintiff admits that it, like all other property owners in Sherrill who are not obliged to pay property taxes, received municipal services such as garbage removal that are provided to everyone. Plaintiff denies that such services include zoning enforcement and planning.

16. Plaintiff denies the allegation in paragraph 43 that it has owed or owes property taxes and admits the allegation that it has not paid property taxes. Plaintiff denies that its possession of property in Sherrill will diminish property taxes available to Sherrill or funds available to Sherrill. Plaintiff denies that the allegation in paragraph 43 that "law abiding, tax-paying citizens will suffer" because of plaintiff's property purchases. The truth is that the Nation's possession of property has bolstered the economic base and revenues of local governments like defendant and that Sherrill residents "suffer" only because defendant has



declined to request or accept Silver Covenant Chain payments and payments for services, payments that exceed the property taxes in dispute and are rejected on the ground that they are not labeled as a tax payment.

17. Because paragraph 44 simply incorporates defendant's allegations in paragraphs 29 through 43, plaintiff, pursuant to Fed. R. Civ. P. 10(c), hereby incorporates its responses to paragraphs 29 through 43.

18. Plaintiff admits the allegation in paragraph 45 that the properties in question are within the boundaries of the City of Sherrill, the State of New York and the United States of America. To the extent that this allegation is meant to include an allegation that the properties are taxable and are not restricted reservation land and part of Indian Country, the allegation is denied. Plaintiff denies that it must abide by defendant's taxation laws and denies any implication that defendant may violate the law of the United States prohibiting taxation of the Nation's lands in Sherrill. Plaintiff denies that defendant has provided the tax and foreclosure notices required by state and federal law. As for allegations of the contents of the Sherrill Charter, it speaks for itself. Plaintiff denies that the Charter compels taxation of Nation lands. The Charter must be interpreted to recognize federal law prohibitions on state and local taxation of Indian lands.

19. Plaintiff denies the allegations in paragraph 46, except that as to the contents of the Sherrill Charter, the Charter speaks for itself.

20. Plaintiff denies that defendant is entitled to tax lands now possessed by plaintiff and denies that defendant is entitled to the declaration for which it prays in paragraph 47. Plaintiff is without sufficient information to admit or deny any allegation concerning lands that could possibly be

possessed in the future.

21. Plaintiff denies that defendant is entitled to the relief requested in paragraph 48.

22. Because paragraph 49 simply incorporates defendant's allegations in paragraph 29 through 43, plaintiff, pursuant to Fed. R. Civ. P. 10(c), hereby incorporates its responses to paragraphs 29 through 43.

23. Plaintiff denies the allegations in paragraph 50.

24. Plaintiff admits that it has not paid property taxes and denies all other allegations in paragraph 51.

40. Defendant's counterclaims fail to state any claim upon which relief can be granted.

D. Second Defense

41. The Nation is a federally recognized Indian tribe, and its sovereign immunity bars defendant's efforts to tax and to take the Nation's lands, bars this suit, and precludes the exercise of jurisdiction over the Nation and the award of any relief requested by defendant. 63 Fed. Reg. 71941 (Dec. 30, 1998).

E. Third Defense

42. Defendant's efforts to tax Nation land, to take Nation land and to evict the Nation from its lands, which are reservation lands and Indian Country subject to the Nation's governance, are in violation of federal constitutional, statutory and common law, including but not limited to the Indian Commerce Clause (Art. I, sec. 8) of the United States Constitution, the 1794 Treaty of Canandaigua, 25 U.S.C. § 177 and federal common law, as alleged in plaintiff's



complaint filed in this action, which complaint is incorporated herein pursuant to Fed. R. Civ. P. 10(c).

F. Fourth Defense

43. Federal law completely preempts the laws of the defendant and of the State of New York, such that those state and local laws are invalid and unenforceable to the extent that they purport to permit taxation of Nation lands. Further, complete preemption bars state and local efforts to restrict an Indian Nation's possession of land or to impose a fee on an Indian Nation because it possesses land.

G. Fifth Defense

44. By virtue of the Supremacy Clause of the United States Constitution, Art. VI, cl.2, the laws of the defendant and of the State of New York are invalid and unenforceable to the extent that they purport to permit taxation of plaintiff's land, the imposition of a fee on plaintiff or regulation of plaintiff's right to possess its lands.

H. Sixth Defense

45. Sherrill may not evict the Nation or take title to or possession of the Nation's lands because defendant violated the notice and due process requirements of state and federal law, as alleged in the complaint in this action and as incorporated here by reference pursuant to Fed. R. Civ. P. 10(c).

I. Seventh Defense

46. The federal constitutional principle of separation of powers bars a judicial order of eviction where Congress has not authorized the conveyance of plaintiff's lands pursuant to the requirements of 25 U.S.C. § 177. The same principle bars an order that plaintiff not "purchase" or

possess lands reserved to it by the 1794 Treaty of Canandaigua, as Congress has not authorized the conveyance of those lands, or dispossessed plaintiff of them, pursuant to 25 U.S.C. § 177. The same principle bars an order imposing a fee on plaintiff as a consequence of its possession of land, or restrictions on improvement of such land, because such matters are committed to Congress.

J. Eighth Defense

47. The Equal Protection Clause of the United States Constitution bars any order that the Nation must pay for services and may not purchase or possess additional property or improve existing property.

K. Ninth Defense

48. The Due Process Clause of the United States Constitution prohibits any order that the Nation not purchase, possess or improve land.

L. Tenth Defense

49. The Takings Clause of the United States Constitution prohibits any order that the Nation not purchase, possess or improve land.

M. Eleventh Defense

50. The Privileges and Immunities Clauses of the United States Constitution prohibits any order that the Nation not purchase, possess or improve land.

N. Twelfth Defense

51. The United States Constitution, including but not limited to the Indian Commerce Clause, the Fifth Amendment and the Fourteenth Amendment, prohibit the



relief requested by Sherrill.

O. Thirteenth Defense

52. Congress has not authorized the taxation or alienation of the lands in dispute in this action, has not authorized any change in their reservation status or their restricted status, and has not authorized any limitation on the Nation's possession or use of such lands.

P. Fourteenth Defense

53. Plaintiff is entitled to a set-off for funds paid to Oneida County pursuant to its Silver Covenant Chain program.

Q. Fifteenth Defense

54. There is no case or controversy, justiciable controversy or actual dispute concerning lands plaintiff does not now possess in Sherrill but may come to possess there in the future. It is speculative whether and how plaintiff will come to possess such lands and whether there will be a tax controversy concerning them. These speculative matters are not a proper basis for declaratory judgment or for an injunction.

R. Sixteenth Defense

55. Defendant has refused to request or accept Silver Covenant Chain payments and has refused to request or accept payments for services, both payments having been offered by plaintiff. These regular payments substantially exceed all property taxes plaintiff contends it is owed annually on all lands in Sherrill possessed by plaintiff. Defendant, accordingly, is estopped from seeking, and has waived any right to seek, damages and injunctive relief.

WHEREFORE, plaintiff prays for entry of judgment in its favor and against defendant, providing that defendant take nothing and providing plaintiff appropriate declaratory and injunctive relief with respect to defendant's illegal and invalid efforts to take and to take Nation lands and providing plaintiff with such other relief to which it may be entitled at law or in equity, including but not limited to attorneys' fees and costs and such orders as are appropriate to assure the Nation's ownership and possession of its lands and to halt Sherrill's efforts to tax and to take those lands.

Dated: March 14, 2000

Respectfully submitted,

MACKENZIE SMITH LEWIS MICHELL & HUGHES, LLP

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**Defendant City Of Sherrill's Statement Of Material Facts, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), July 14, 2000**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| THE ONEIDA INDIAN NATION,<br>Route 5<br>Vernon, New York, 13476,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF SHERRILL,<br>377 Sherrill Road<br>Sherrill, New York 13461,<br><br>Defendant | : | Civil Action No. 00-CV-223 (NJM)<br><br>DEFENDANT CITY OF SHERRILL'S STATEMENT OF MATERIAL FACTS |

1. Plaintiff Oneida Indian Nation ("OIN") is a federally recognized Indian tribe. Complaint, ¶ 5 (attached to Barker Affidavit, dated July 12, 2000 ("Barker Aff."), Ex. 4.)

2. Defendant City of Sherrill ("Sherrill") is a municipal corporation organized under the laws of the State of New York, Complaint, ¶ 6 (Barker Aff., Ex. 4).

3. In 1997 and 1998, OIN purchased two properties (the "Properties") fronting on Route 5, within the municipal boundaries of Sherrill. On one, OIN has a textile distribution facility. On the other, OIN has a gas station and convenience store. These Properties consist of ten tax sub-parcels. Complaint, ¶ 11 (Barker Aff., Ex. 4).



4. OIN purchased the Properties from non-Indians through voluntary, free-market transactions; these Proprieties were not purchased by the federal government. Complaint, ¶ 11 (Barker Aff., Ex. 4).

5. The Bureau of Indian Affairs recognizes thirty-two acres of land in Madison County, and no land in Oneida County, as land under its jurisdiction. Annual Report of Indian Lands, dated December 31, 1997 (Barker Aff. Ex. 8). The Properties, all of which are located in Oneida County, are not within that thirty-two acre tract. Complaint, ¶ 7 (Barker Aff. Ex. 4).

6. The Sherrill Properties have not been held in trust by the Federal Government for the benefit of individual members of OIN; rather, OIN acquired the Properties by purchasing them from private individuals in voluntary, free market transactions. Complaint, ¶ 11 (Barker Aff., Ex. 4).

7. Sherrill, pursuant to its city charter, has sought to collect property taxes on the Properties. OIN has refused to pay those taxes. Complaint, ¶ 13 (Barker Aff., Ex. 4).

8. The municipal services OIN receives are provided by Sherrill, not by the federal government. Barker Aff. at ¶ 4.

9. Title to three sub-parcels of the Properties, one which houses the OIN textile facility and two vacant sub-parcels which serve as parking lots to the textile facility, was conveyed to Sherrill by Tax Sale Deed on February 9, 2000. Oneida County Clerk's Recording Certificate of the Tax Sale Deed, dated February 9, 2000 (Barker Aff., Ex. 7).

Dated: New York, New York
July 14, 2000

FRIED, FRANK, HARRIS, SHRIVER
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(A Partnership Including
Professional Corporations)

By:_____
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| THE ONEIDA INDIAN NATION<br>Route 5<br>Vernon, New York 13476 | : | |
| Plaintiff, | : | Civil Action No. 00-CV-223 (NJM) (GLS) |
| v. | : | **CITY OF SHERRILL'S RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS** |
| CITY OF SHERRILL<br>377 Sherrill Road<br>Sherrill, New York 13461 | : | |
| Defendant. | : | |

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedures, defendant City of Sherrill ("Sherrill") submits the following objections and responses to the document requests set forth in Plaintiff's First Requests for Production of Documents (the "Request").

GENERAL OBJECTIONS

1. Sherrill objects to the Request to the extent that compliance with the Request would exceed its obligations pursuant to the Federal Rules of civil Procedure.

2. Sherrill objects to the Request to the extent that it is overly broad in scope, unduly burdensome, redundant, vague, ambiguously, harassing, oppressive, lacking in particularity, or seeks documents that are neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence, as well as to the extent that it would impose an unjust burden on Sherrill to respond in the form of an excessive expenditure of time and money.

3. Sherrill objects to the Request insofar as it seeks documents or things that are unreasonably cumulative, duplicative, or that are obtainable from some other source that is more convenient, less burdensome, or less expensive.

4. Sherrill objects to the Request to the extent that it calls for the production of documents that are within the custody, control, or possession of the plaintiff.

5. Sherrill objects to the Request to the extent that it seeks the production of documents or things that are not within the possession, custody, or control of Sherrill.

6. Sherrill objects to the Request to the extent that it seeks documents or things protected by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege or immunity. Sherrill does not intent to produce such documents. Inadvertent production of any privileged document otherwise immune from discovery shall not be deemed a waiver of any applicable privilege or work product protection. Rather than delay production of responsive, non-privileged documents, Sherrill will produce responsive, non-privilege documents as indicated in its specific responses below and will, in due course, produce a list of privileged documents pursuant to Fed. R. Civ. P. 26.



BEST AVAILABLE COPY

7. Sherrill submits this response and will submit documents without waiving (i) the right to object on any grounds (including but not limited to competence, relevant, materiality, privilege, or admissibility) to the use of the responses or documents as evidence for any purpose, or to the use of the documents in any proceeding; (ii) the right to object on any ground to any other discovery concerning the subject matter of the Request; and (iii) the right (but not the obligation, except as provided by law or rule) to supplement this response and document production. By producing a document, Sherrill does not admit that such a document is indeed responsive to the Request.

8. Sherrill objects to these Requests to the extent they call for conclusions of law, given that the Court must ultimately formulate such conclusions after the parties present their evidence.

9. Sherrill objects to the Requests to the extent they are premature, given that expert discovery has not yet begun and fact discovery remains to be completed.

10. Any Response of Sherrill to any Request that it will produce documents is not intended as a representation that such documents exist.

11. These General Objections are incorporated into each of the specific responses set forth below.

SPECIFIC RESPONSES

Request No. 1:

Produce all documents that mention, reflect or refer to any decision or act by the Congress of the United States, by the House of Representatives, by the Senate or by the President of the United States, with respect to the Oneida parcels, to eliminate the status of that land as Oneida

reservation land or otherwise to change its reservation status in any respect.

Response to Request No. 1:

In addition to its General Objections, Sherrill objects to this Request as vague, ambiguous, overbroad, and unduly burdensome, especially in its request for publicly-available documents and documents relating to governmental bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to this Request to the extent it calls for a legal conclusion on Sherrill's part. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 2:

Produce all documents that mention, reflect or refer to any decision or act by the Congress of the United States, by any house thereof or by the President of the United States, with respect to the Oneida parcels, to subject such land, when in the actual possession of the Oneida Indian Nation of New York, to taxation by the State of New York or by its political subdivisions.

Response to Request No. 2:

In addition to its General Objections, Sherrill objects to this Request as vague, overbroad, and unduly burdensome, especially in its request for publicly-available documents and documents relating governmental bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to this Request to the extent it calls for a legal conclusion on Sherrill's part. Subject to these objections, Sherrill will product responsive documents form its files.

Request No. 3:



Produce all documents that mention, reflect or refer to any ratification of or approval by the Congress of the United States, by any house thereof or by the President of the United States of any sale, from 1789 to the present, of the Oneida parcels or of any larger parcel including any of that land.

Response to Request No. 3:

In addition to General Objections, Sherrill objects to this Request as overbroad and unduly burdensome, especially in its request for publicly-available documents and documents relating to governmental bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to this Request to the extent it calls for a legal conclusion on Sherrill's part. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 4:

Produce all documents that mention, reflect or refer to federal approval in accordance with the Non-Intercourse Act, 25 U.S.C. § 177, of any sale, from 1789 to the present, of the Oneida parcels or of any larger parcel including any of that land.

Response to Request No. 4:

In addition to its General Objections, Sherrill objects to this Request as vague, overbroad, and unduly burdensome, especially in its request for publicly-available documents and documents relating to governmental bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to the Request to the extent it calls for a legal conclusion on Sherrill's part. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 5:

Produce all documents that mention, reflect or demonstrate that the Oneida parcels are not today subject to restrictions against alienation imposed by the Non-Intercourse Act, 25 U.S.C. § 177, are not today Indian country within the meaning of 18 U.S.C. § 1151, or do not today have the status of Oneida reservation land.

Response to Request No. 5:

In addition to its General Objections, Sherrill objects to this Request as vague, ambiguous, overbroad, and unduly burdensome, especially in its request for publicly-available documents and documents relating to governmental bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to this Request to the extent it calls for a legal conclusion on Sherrill's part. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 6:

Produce all documents that reflect, mention or demonstrate any decision or act by the government of the United States, or any part of it, to permit taxation of the Oneida parcels, or any larger parcels of which they are a part, by the Stat of New York or by its political subdivisions.

Response to Request No. 6:

In addition to its General Objections, Sherrill objects to this Request as overbroad and unduly burdensome, especially in its request for publicly-available documents and documents relating to governmental bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to this Request to the extent it calls for a legal conclusion on Sherrill's part. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 7:



Produce all documents that reflect, mention or demonstrate any decision or act by the government of the United States, or any part of it, to change or diminish any right of the Oneida Indian Nation under the 1794 Treaty of Canandaigua with respect to the Oneida parcels or to alter the status of that land under the that treaty.

Response to Request No. 7:

In addition to its General Objections, Sherrill objects to this Request as overbroad and unduly burdensome, especially in its request for publicly-available documents and documents relating to governmental bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to this Request to the extent it calls for a legal conclusion on Sherrill's part, and objects to the term "right" on the grounds that it is vague, ambiguous, and undefined. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 8:

Produce all documents that you contend demonstrate the right of or permit the City of Sherrill, notwithstanding the 1794 Treat of Canandaigua, to tax the Oneida parcels when those lands are in the actual possession of the Oneida Indian Nation.

Response to Request No. 8:

In addition to its General Objections, Sherrill objects to this Request as duplicative of other requests, overbroad, and unduly burdensome. Sherrill further objects to this Request to the extent it calls for a legal conclusion on Sherrill's part. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 9:

Produce all documents that reflect or are a part of any effort by the City of Sherrill to give notice to the Oneida Indian Nation with respect to the collection of taxes on the Oneida parcels, with respect to delinquency in payment of such taxes, or with respect to foreclosure or eviction for non-payment of such taxes.

Response to Request No. 9:

In addition to its General Objections, Sherrill objects to this Request as vague and ambiguous. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 10:

Produce all documents that reflect or are a part of any effort by the City of Sherrill to give notice to the Oneida Indian Nation concerning a right to redeem the Oneida parcels.

Response to Request No. 10:

In addition to its General Objections, Sherrill objects to this Request as duplicative of other requests. Subject to these objections, Sherrill will produce responsive documents from its files.

Request No. 11:

Produce all documents identified or referred to in your answer and counterclaim.

Response to Request No. 11:

Subject to its General Objections, Sherrill will produce responsive documents from its files.



Request No. 12:

Produce the expert report described in Fed. R. Civ. P.26(a)(2)(B).

Response to Request No. 12:

In addition to its General Objections, Sherrill objects to this Request as premature.

Request No. 13:

To the extent not produced in response to the above requests, produce all documents that you contend support your denials of the allegations in paragraphs 8 and 17, 18, 29 and 20 of the Oneida Indian Nation's complaint.

Response to Request No. 13:

In addition to its General Objections, Sherrill objects to this Request as duplicative of other Requests, overbroad, and unduly burdensome, especially in its request for publicly-available documents and documents relating to governmental bodies and officials other than Sherrill and Sherrill officials. Subject to these objections, Sherrill will produce responsive documents from its files.

Sherrill also notes that there is no paragraph 29 in the Complaint. To the extent Request No. 13 contains a typographical error and should read "paragraph 19" instead of "paragraph 29," Sherrill reiterates its objections to Request No. 13 for paragraph 19 of the Complaint.

Request No. 14:

Produce all documents to which you refer in any answer to plaintiff's interrogatories or requests for admissions, served together with these document requests.

Response to Request No. 14:

Subject to its General Objections, Sherrill will produce responsive documents from its files.

Request No. 15:

Produce all documents, created since 1996, that mention the Oneida parcels or taxation of Oneida land in the City of Sherrill.

Response to Request No. 15:

In addition to its General Objections, Sherrill objects to this Request as duplicative of other requests, overbroad, and unduly burdensome. Subject to these objections, Sherrill will produce responsive documents from its files.

Dated: August 14, 2000
New York, New York

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)

By:_____
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Attorneys for Defendant
City of Sherrill



CERTIFICATE OF SERVICE

I certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that on August 14, 2000 I caused to be served upon the following by Federal Express a true copy of the City of Sherrill's Response to Plaintiff's First Request for Production of Documents:

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Attorneys for Plaintiff Oneida Indian Nation

Dated: New York, New York
August 14, 2000

Laura Sulem



**City Of Sherrill's Response To Plaintiff's First Set of Interrogatories, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), August 14, 2000**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| THE ONEIDA INDIAN NATION, Route 5 Vernon, New York 13476, Plaintiff, | : | Civil Action No. 00-CV-223 (NJM)(GLS) |
| vs. | : | CITY OF SHERRILL'S RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES |
| CITY OF SHERRILL, 377 Sherrill Road Sherrill, New York 13461, Defendant. | : | |

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, defendant City of Sherrill ("Sherrill") hereby answers the interrogatories set forth in Plaintiff's First Set of Interrogatories (the "Interrogatories"). The answers set forth below are based on information currently possessed by Sherrill. Sherrill reserves (i) the right to object on any grounds (including but not limited to competence, relevance, materiality, privilege, confidentiality, authenticity, or admissibility) to the use of these answers in any proceeding or in the trial of this or any other matter, (ii) the right to object to any other discovery concerning the subject matter of the Interrogatories, and (iii) the right but not the obligation (except as required by law or rule) to correct, revise, clarify, supplement, or amend these answers and objections.

GENERAL OBJECTIONS

Sherrill asserts the following general objections to each Interrogatory, and each such general objection is hereby incorporated into Sherrill's response to each Interrogatory as if fully set forth therein:

1. Sherrill objects to each Interrogatory to the extent it seeks information from third parties and information not within its possession, custody, control, or personal knowledge. Sherrill further objects to the extent any Interrogatory seeks information regarding the acts, decisions, or policies of any government body other than Sherrill or about any government officials other than Sherrill officials.

2. Sherrill objects to the Interrogatories (including the definitions and instructions) to the extent they seek information in violation of the Local Civil Rules of the United States District Court for the Northern District of New York and the Federal Rules of Civil Procedure.

3. Sherrill objects to each Interrogatory to the extent it seeks information that is protected from discovery under the attorney-client privilege or the work-product doctrine, or which falls within any other privilege, immunity, protection, or restriction. The inclusion of any information in any response shall not constitute a waiver of such privilege or immunity.

4. Sherrill objects to each Interrogatory to the extent it seeks information in the possession of, known to, or otherwise equally available to plaintiff.

5. Sherrill objects to the Interrogatories to the extent they are premature, given that expert discovery has not yet begun and fact discovery remains to be completed.



6. Sherrill objects to each Interrogatory to the extent it is overly broad in scope, unduly burdensome, redundant, vague, ambiguous, harassing, oppressive, or seeks information neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence, as well as to the extent it would impose an unjust burden on Sherrill to respond in the form of an excessive expenditure of time and money.

7. Sherrill objects to each Interrogatory to the extent it calls for a conclusion of law, given that the Court must ultimately formulate such conclusions after the parties present their evidence.

8. No objection or limitation, or lack thereof, made in these responses and objections shall be deemed an admission by Sherrill as to the existence or non-existence of information.

SPECIFIC ANSWERS AND OBJECTIONS

Interrogatory No. 1:

Explain in reasonable detail the basis for your denials in paragraph 17 of your answer.

Response to Interrogatory No. 1:

In addition to its General Objections, Sherrill objects to Interrogatory No. 1 as overbroad, unduly burdensome, and premature. Sherrill further objects to Interrogatory No. 1 on the grounds that it calls for a conclusion of law and refers to the document referenced in paragraph 17 of the Complaint for its contents.

Interrogatory No. 2:

Explain in reasonable detail the basis for your denials in paragraph 18 of your answer.

Response to Interrogatory No. 2:

In addition to its General Objections, Sherrill objects to Interrogatory No. 2 on the grounds that it is premature and calls for a conclusion of law. Sherrill further objects to Interrogatory No. 2 on the ground that paragraph 18 of its Answer specifically states that no responsive pleading at all was required because paragraph 18 of the Complaint alleged no facts.

Interrogatory No. 3:

Explain in reasonable detail the basis for your denials in paragraph 19 of your answer.

Response to Interrogatory No. 3:

In addition to its General Objections, Sherrill objects to Interrogatory No. 3 on the grounds that it is premature and calls for a conclusion of law. Sherrill further objects to Interrogatory No. 3 on the ground that paragraph 19 of its Answer specifically states that no responsive pleading at all was required because paragraph 19 of the Complaint alleged no facts.

Interrogatory No. 4:

Explain in reasonable detail the basis for your denials in paragraph 20 of your answer.

Response to Interrogatory No. 4:

In addition to its General Objections, Sherrill objects to Interrogatory No. 4 on the grounds that it is premature and calls for conclusions of law. Sherrill further objects to Interrogatory No. 4 on the ground that paragraph 20 of its Answer specifically states that no responsive pleading at all was required because paragraph 20 of the Complaint alleged no facts.

Interrogatory No. 5:

Identify with particularity every Act of Congress or



law of the United States upon which you base any contention that the Oneida parcels, when in the actual possession of the Oneida Indian Nation, are not reservation land, are not Indian country, are not subject to federal restrictions against alienation, or are taxable by the State of New York or its political subdivisions.

Response to Interrogatory No. 5:

In addition to its General Objections, Sherrill objects to Interrogatory No. 5 on the grounds that it is overbroad and unduly burdensome. Sherrill further objects on the grounds that Interrogatory No. 5 is premature and calls for conclusions of law.

Interrogatory No. 6:

Identify every act or decision of the legislative branch, the judicial branch or the executive branch of the government of the United States upon which you base any contention that the Oneida parcels, when in the actual possession of the Oneida Indian Nation, are not reservation land, are not Indian country, are not subject to federal restrictions against alienation, or are taxable by the State of New York or its political subdivisions.

Response to Interrogatory No. 6:

In addition to its General Objections, Sherrill objects to Interrogatory No. 6 on the ground that it is duplicative of information already in the possession of plaintiff and refers plaintiff to Sherrill's Memorandum of Law in Support of its Motion for Summary Judgment, or in the Alternative for a Preliminary Injunction, which was served on plaintiff on July 14, 2000. Sherrill further objects on the grounds that Interrogatory No. 6 is overbroad and unduly burdensome, especially in its request for information about acts and decisions of government bodies and officials other than Sherrill and Sherrill officials.

Interrogatory No. 7:

Do you contend that, between 1789 and the present, any part of the federal government expressly ratified or approved any sale of the Oneida parcels, or of any larger parcel including any of these parcels; if so, explain in reasonable detail the factual basis for your contention, identifying with particularity each act of express ratification or approval and giving its date.

Response to Interrogatory No. 7:

In addition to its General Objections, Sherrill objects to Interrogatory No. 7 on the grounds that it is overbroad and unduly burdensome, especially in its request for information about acts and decisions of government bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to Interrogatory No. 7 on the ground that it is premature.

Interrogatory No. 8:

Do you deny that the 1794 Treaty of Canandaigua affirmed an Oneida reservation with designated boundaries; if so, explain in reasonable detail the basis for your position.

Response to Interrogatory No. 8:

In addition to its General Objections, Sherrill objects to Interrogatory No. 8 on the ground that it calls for a conclusion of law and refers to the treaty referred to in Interrogatory No. 8 for its contents.

Interrogatory No. 9:

Do you contend that the Oneida parcels, whether or not they have reservation status today, are geographically outside of the reservation boundaries affirmed in the 1794 Treaty of Canandaigua; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 9:



In addition to its General Objections, Sherrill objects to Interrogatory No. 9 on the ground that it is premature and refers to the treaty referred to in Interrogatory No. 9 for its contents.

Interrogatory No. 10:

Do you deny that the Oneida parcels, regardless of their status today, were in 1805, 1806 and 1807 subject to federal restrictions against alienation and were not taxable by the State of New York and its political subdivisions; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 10:

In addition to its General Objections, Sherrill objects to Interrogatory No. 10 on the grounds that it is premature and calls for conclusions of law.

Interrogatory No. 11:

Do you contend that the Congress of the United States, any house thereof or any branch of the government of the United States, at any time, expressly changed the reservation status, the tax status or the restricted status any of the Oneida parcels or of any larger parcels including these parcels; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 11:

In addition to its General Objections, Sherrill objects to Interrogatory No. 11 on the grounds that it is overbroad and unduly burdensome, especially in its request for information about acts and decisions of government bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to Interrogatory No. 11 on the ground that it is premature.

Interrogatory No. 12:

Do you contend that the Congress of the United

States, or any house thereof or any branch of the government of the United States, at any time, impliedly changed the reservation status, the tax status or the restricted status of any of the Oneida parcels or of any larger parcels including those parcels; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 12:

In addition to its General Objections, Sherrill objects to Interrogatory No. 12 on the grounds that it is overbroad and unduly burdensome, especially in its request for information about acts and decisions of government bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to Interrogatory No. 12 on the grounds that it is premature and calls for a conclusion of law, and objects to the term "impliedly" as vague, ambiguous, and undefined.

Interrogatory No. 13:

Do you contend that the Congress of the United States, or any house thereof, expressly approved or ratified a sale or transfer of the Oneida parcels, or of a larger tract of which they were a part, to Cornelius Dockstader in 1805 or to Peter Smith in 1807; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 13:

In addition to its General Objections, Sherrill objects to Interrogatory No. 13 as overbroad and unduly burdensome, especially in its request for information about acts and decisions of government bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to Interrogatory No. 13 as premature.

Interrogatory No. 14:

Do you deny that the transfers or sales of the Oneida parcels in 1805 to Cornelius Dockstader and in 1807 to Peter



Smith were void ab initio; if so, explain in reasonable detail the basis for your denial.

Response to Interrogatory No. 14:

In addition to its General Objections, Sherrill objects to Interrogatory No. 14 on the grounds that it is premature and calls for a conclusion of law.

Interrogatory No. 15:

Do you contend that the Congress of the United States, or any house thereof, at any time, impliedly approved or ratified any sale or transfer of the Oneida parcels or of a larger tract of which they were a part; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 15:

In addition to its General Objections, Sherrill objects to Interrogatory No. 15 on the grounds that it is overbroad and unduly burdensome, especially in its request for information about acts and decisions of government bodies and officials other than Sherrill and Sherrill officials. Sherrill further objects to Interrogatory No. 15 on the ground that it is premature, and objects to the term "impliedly" as vague, ambiguous, and undefined.

Interrogatory No. 16:

Do you contend that any sale or transfer of the Oneida parcels, or of a larger tract of which they were a part, never has occurred in accordance with the requirements of the then-existing Non-Intercourse Act, 25 U.S.C. § 177; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 16:

In addition to its General Objections, Sherrill objects to Interrogatory No. 16 on the grounds that it is premature and calls for a conclusion of law.

Interrogatory No. 17:

Do you contend that the City of Sherrill is entitled to tax the Oneida parcels even if they constitute a part of the Oneida reservation, are in the actual possession of the Oneida Indian Nation, are restricted against alienation pursuant to 15 U.S.C. § 177 and are Indian country within the meaning of 18 U.S.C. § 1151; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 17:

In addition to its General Objections, Sherrill objects to Interrogatory No. 17 on the grounds that it is unduly burdensome, oppressive, and premature. Sherrill further objects to Interrogatory No. 17 on the ground that it requests information and evidence that will be presented in Sherrill's pre-trial brief.

Interrogatory No. 18:

If the City of Sherrill may tax the Oneida parcels, do you contend that the City of Sherrill may evict the Oneida Indian Nation notwithstanding its sovereign immunity; if so, explain in reasonable detail the basis for your contention.

Response to Interrogatory No. 18:

In addition to its General Objections, Sherrill objects to Interrogatory No. 18 on the grounds that it is unduly burdensome and oppressive. Sherrill further objects to Interrogatory No. 18 on the ground that it calls for a conclusion of law.

Interrogatory No. 19:

With respect to any request for admission served with these interrogatories that you do not unqualifiedly admit, state in reasonable detail the basis for not giving an unqualified admission.

Response to Interrogatory No. 19:



In addition to its General Objections, Sherrill objects to Interrogatory No. 19 on the grounds that it is unduly burdensome, oppressive, and premature.

Interrogatory No. 20:

Give the tax identification number, size, and name of owner of every tax parcel in the City of Sherrill that the City of Sherrill does not attempt to tax, whether because of a tax exemption or for any other reason.

Response to Interrogatory No. 20:

The following Sherrill properties are exempt from property taxation:

| Tax Parcel No. | Parcel Size | Parcel Owner |
|---|---|---|
| 322.014-1-4.2 | 35' x 30' | City of Sherrill |
| 322.014-1-23* | 100' x 200' | City of Sherrill |
| 322.014-1-25* | 55' x 211.6' | City of Sherrill |
| 322.014-1-26* | .4 acres | City of Sherrill |
| 322.014-1-30 | 34.07 acres | Oneida County Industrial Development Agency |
| 322.015-1-1.75 | Information not available | Oneida County Industrial Development Corporation and Sterling Power Partners |
| 322.015-1-1.77 | Information not available | City of Sherrill |
| 322.015-1-1.78 | 2.5 acres | Oneida County Industrial Development Corporation and |

| Tax Parcel No. | Parcel Size | Parcel Owner |
|---|---|---|
| | | Sterling Power Partners |
| 322.015-1-18 | 4 acres | City of Sherrill |
| 322.015-1-24 | 180 x 164.6' | City of Sherrill |
| 322.015-1-56 | 1 acre | City of Sherrill |
| 322.015-1-70 | 378.95' x 100' | Sherrill Post 230 American Legion |
| 322.015-2-40.1 | 5.56 acres | City of Sherrill |
| 322.016-1-9.7 | 2.51 acres | State of New York |
| 322.016-1-78.1 | 140.85' x 50' | City of Sherrill |
| 322.017-1-9 | 10.35 acres | City of Sherrill |
| 322.017-1-32 | 1.66 acres | Sherrill Kenwood Water District |
| 322.018-1-1.2 | 6.5 acres | Sherrill-Kenwood Community and Retirement Housing |
| 322.018-1-1.4 | .2 acres | City of Sherrill |
| 322.018-1-1.61 | 1 acre | Sherrill-Kenwood Water District |
| 322.018-1-5 | 5.97 acres | City of Sherrill |
| 322.019-1-16 | 1.6 acres | City of Sherrill |
| 322.019-1-17 | 1.74 acres | City of Sherrill |
| 322.019-1-38 | 255' x 246' | City of Sherrill |
| 322.019-1-55 | 150.17' x 146.43' | City of Sherrill |
| 322.019-1-69 | 5.9 acres | Vernon Verona Sherrill School |



| Tax Parcel No. | Parcel Size | Parcel Owner |
|---|---|---|
| | | District |
| 322.019-1-70 | 1.7 acres | Church Plymouth |
| 322.019-1-71 | 1.4 acres | City of Sherrill |
| 322.019-1-72 | 7.1 acres | City of Sherrill |
| 322.019-2-48 | 1.3 acres | St. Helena Church and Parsonage |
| 322.019-2-49 | 7.6 acres | City of Sherrill |
| 332.006-2-64 | 4.8 acres | City of Sherrill |
| 332.007-1-48 | 279.8' x 162.9' | Church Christ Methodist |
| 332.007-2-38 | 87' x 165' | Parsonage Christ Methodist |
| 332.007-2-71 | 180' x 97' | Church Gethsemane Episcopal |
| 332.007-3-6 | 2.3 acres | City of Sherrill |
| 332.007-4-26 | 65' x 160' | Sherrill Grange 1567 |
| 332.007-5-31 | 1.1 acres | City of Sherrill |
| 332.011-1-47 | 5.7 acres | Sherrill-Kenwood Water District |

* After Sherrill transferred ownership of these parcels to itself by filing the tax sale deed on February 9, 2000, Sherrill removed them from the tax rolls and now classifies them as City of Sherrill property, and therefore property tax exempt.

Interrogatory No. 21:

Regarding your allegations in paragraph 59 of your

fourth counterclaim concerning irreparable harm and a decrease in the City of Sherrill's property tax revenues, identify the City of Sherrill's annual property tax revenues for each year from 1990 to the present.

Response to Interrogatory No. 21:

| Year | Current and Delinquent Taxes to Be Collected | Total Revenue Collected | Uncollected Taxes |
|---|---|---|---|
| 1990 | $527,991 | $524,102 | $3,889 |
| 1991 | 529,991 | 528,380 | 1,611 |
| 1992 | 634,041 | 629,441 | 4,600 |
| 1993 | 574,144 | 569,788 | 4,356 |
| 1994 | 579,333 | 576,719 | 2,614 |
| 1995 | 585,849 | 583,014 | 2,835 |
| 1996 | 602,716 | 600,461 | 2,255 |
| 1997 | 611,195 | 606,728 | 4,467 |
| 1998 | 633,129 | 625,036 | 8,093 |
| 1999 | 665,971 | 656,831 | 9,140 |



Interrogatory No. 22:

Explain in reasonable detail the basis for your allegation in paragraph 30 of your counterclaim that the Oneida parcels "were neither reservation land nor Indian Country."

Response to Interrogatory No. 22:

In addition to its General Objections, Sherrill objects to Interrogatory No. 22 on the ground that it is duplicative of information already in the possession of plaintiff and refers plaintiff to Sherrill's Memorandum of Law in Support of its Motion for Summary Judgment, or in the Alternative for a Preliminary Injunction, which was served on plaintiff on July 14, 2000. Sherrill further objects to Interrogatory No. 22 on the ground that it is premature.

Interrogatory No. 23:

With respect to each of the Oneida parcels, parcel by parcel, identify with particularity each notice the City of Sherrill gave to the Oneida Indian Nation regarding taxes due on each such parcel, enforcement by the City of Sherrill of its tax laws as to each such parcel, tax sales of each such parcel, or foreclosure, eviction or the right to redeem each such parcel, giving the date, method of service and recipient of each such notice and a brief summary of the content of each such notice.

Response to Interrogatory No. 23:

| Tax Parcel No. | Description of Notice |
|---|---|
| 322.014-1-23<br>322.014-1-25<br>322.014-1-26 | August 7, 1997 letter from Michael Holmes to Ray Halbritter notified OIN that it was delinquent in paying its 1997 taxes for these parcels and stated that payment in full was due by September 2, 1997 or Sherrill would proceed according to section 94 of |

Sherrill's Charter, which sets forth Sherrill's property redemption procedures.

September 17 and 24, 1997, and October 1, 8, 15, 22, and 29, 1997 publication in Oneida Daily Dispatch of tax sale notice for these parcels. Tax sale was scheduled for November 5, 1997. Tax sale notice was also posted at Sherrill City Hall, Sherrill's Police Station, and the Sherrill Post Office.

On or about February 27, 1998 a tax bill was mailed to Ray Halbritter, billing him for 1998 taxes as well as unpaid taxes from 1997.

August 4, 1998 letter from Michael Holmes to Ray Halbritter notified OIN that it was delinquent in paying its 1998 taxes for these parcels and stated that payment in full was due by September 4, 1998 or Sherrill would proceed according to section 94 of Sherrill's Charter, which sets forth Sherrill's property redemption procedures.

September 17 and 24, 1998 and October 1, 8, 15, 22, and 29, 1998 publication of tax sale notice for these parcels. Tax sale was scheduled for November 5, 1998. Tax sale notice was also posted at Sherrill City Hall, Sherrill's Police Station, and the



Sherrill Post Office.

On or about February 26, 1999 a tax bill was mailed to Ray Halbritter, billing him for 1999 taxes as well as unpaid taxes from 1998 and 1997.

August 4, 1999 letter from Michael Holmes to Ray Halbritter notified OIN that it was delinquent in paying its 1999 taxes for these parcels and stated that payment in full was due by September 3, 1999 or Sherrill would proceed according to section 94 of the Sherrill Charter, which sets forth Sherrill's property redemption procedures.

November 8, 1999, December 8, 1999, and January 7, 2000 publication of Notice of Redemption in Oneida Daily Dispatch, stating February 8, 2000 as last day to redeem these parcels.

January 10, 2000 publication of Notice of Redemption in Oneida Daily Sentinel, stating February 8, 2000 as last day to redeem these parcels.

January 10, 2000 personal service of Notice of Redemption for parcel 322.014-1-23 on William Hervey, then Oneida Indian Nation's Director of Intergovernmental Relations, and Kathy Perham, then Oneida Textile Designs' Executive Assistant to the General Manager. Notice of

| | |
|---|---|
| | Redemption stated that the last day to redeem these parcels is February 8, 2000. Additionally, Notice of Redemption for parcels 322.014-1-25 and 322.014-1-26 were personally served on William Hervey and were also posted on those parcels. |
| 322.014-1-24<br>322.015-2-1<br>322.015-2-64<br>322.015-2-65 | On or about February 27, 1998 a tax bill was mailed to Ray Halbritter, billing him for 1998 taxes for these parcels. |
| | August 4, 1998 letter from Michael Holmes to Ray Halbritter notified OIN that it was delinquent in paying its 1998 taxes for these parcels and stated that payment in full was due by September 4, 1998 or Sherrill would proceed according to section 94 of Sherrill's Charter, which sets forth Sherrill's property redemption procedures. |
| | September 17 and 24, 1998 and October 1, 8, 15, 22, and 29, 1998 publication of tax sale notice for these parcels. Tax sale was scheduled for November 5, 1998. Tax sale notice was also posted at Sherrill City Hall, Sherrill's Police Station, and the Sherrill Post Office. |
| | On or about February 26, 1999 a tax bill was mailed to Ray Halbritter, billing him for 1999 taxes as well as unpaid taxes from 1998 for these |



| | |
|---|---|
| | parcels. |
| | August 4, 1999 letter from Michael Holmes to Ray Halbritter notified OIN that it was delinquent in paying its 1999 taxes for these parcels and stated that payment in full was due by September 3, 1999 or Sherrill would proceed according to section 94 of Sherrill's Charter, which sets forth Sherrill's property redemption procedures. |
| | March 6, 2000 letter from Michael Holmes to Ray Halbritter enclosed the 2000 tax bill for these parcels and stated that Sherrill assumed the tax sale certificate for these parcels on November 5, 1998 and filed said certificate on November 16, 1998. Letter also quoted from section 94f of Sherrill's Charter, which sets forth Sherrill's property redemption procedures, and stated that the redemption period for these parcels expires on November 5, 2000. |
| 322.015-2-40.3<br>322.015-2-45.1<br>322.015-2-47 | On or about February 26, 1999 a tax bill was mailed to Ray Halbritter, billing him for 1999 taxes for these parcels. |
| | August 4, 1999 letter from Michael Holmes to Ray<br>Halbritter notified OIN that it was delinquent in paying its 1999 taxes for these parcels and stated that payment |

in full was due by September 3, 1999 or Sherrill would proceed according to section 94 of Sherrill's Charter, which sets forth Sherrill's property redemption procedures.

September 22 and 29, 1999; October 6, 13, 20, 27, 1999; and November 3, 1999 publication of tax sale notice for these parcels. Tax sale was scheduled for November 10, 1999. Tax sale notice was also posted at Sherrill City Hall, Sherrill's Police Station, and the Sherrill Post Office.

March 6, 2000 letter from Michael Holmes to Ray Halbritter enclosed the 2000 tax bill for these parcels and stated that Sherrill assumed the tax sale certificate for these parcels on November 10, 1999 and filed said certificate on November 24, 1999. Letter also quoted from section 94f of Sherrill's Charter, which sets forth Sherrill's property redemption procedures, and stated that the redemption period for these parcels expires on November 10, 2001.

Interrogatory No. 24:

Specify with particularity the damage award requested in paragraphs 57 and 65 (d) of your complaint and explain in detail how you calculate the amount for which you seek reimbursement.

Response to Interrogatory No. 24:



In addition to its General Objections, Sherrill objects to Interrogatory No. 24 as premature.

Interrogatory No. 25:

Identify each expert whose opinions you may present at trial; for each, state each opinion the expert will give and provide the basis for each opinion.

Response to Interrogatory No. 25:

In addition to its General Objections, Sherrill objects to Interrogatory No. 25 on the ground that it is premature.

Dated: August 14, 2000
New York, New York

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)

By: _____
Ira S. Sacks
(Bar Roll No. 510475)
(A Member of the Firm)
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Attorneys for Defendant City of Sherrill

328383

**Declaration of Paul Thomas, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), September 5, 2000**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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ONEIDA INDIAN NATION
Route 5
Vernon, New York 13476,

Plaintiff,

-vs- Civil Action No. 00-CV-223 (NPM/GJD)

CITY OF SHERRILL
377 Sherrill Road
Sherrill, New York 13461,

Defendant.

---

DECLARATION OF PAUL A. THOMAS, JR.

I, PAUL A. THOMAS, JR., hereby state:

1. I am over 18 years old and am competent to make this Declaration. Unless otherwise indicated, I have personal knowledge of the statements made herein.

2. I am an employee of Monroe-Madison Title Agency, LLC ("Monroe-Madison"), a subsidiary of Monroe Title Insurance Corporation ("Monroe Title") which is headquartered in Rochester, New York. Monroe Title operates offices in Madison and Oneida Counties, located in Wampsville, New York, and Utica, New York, respectively.



3. I received a B.A. in political science from the State University of New York at Fredonia in 1973. Since my graduation from college, I have worked in the field of real estate title services and research. Since 1976, my work in real estate title matters has been primarily in the Oneida and Madison County area. I founded Madison Abstract and Title Company with offices in Wampsville, New York and Utica, New York in 1983. I was President of Madison Abstract until it became a part of Monroe Title Insurance Corporation in1997.

4. I am familiar with and experienced in title research, title opinions, title examination and preparation of title abstracts. I have examined and researched titles for more than 25 years and have provided title opinions on numerous occasions. I have testified as an expert on title issues on approximately four occasions and was accepted as an expert by the court in each instance.

5. I am familiar with the parcels of land located on New York State Route 5 in Sherrill, New York (Oneida County), owned and occupied by the Oneida Indian Nation. One group of parcels is occupied by Oneida Textile, a textile manufacturing facility and retail outlet, located between Route 5 and Prospect Road. An excerpt from the tax map of the City of Sherrill indicating the locations of these parcels is attached as Exhibit 1. The tax parcel numbers for the textile facility and outlet are: 322.014-1-23, 322.014-1-24, 322.014-1-25, 322.-14-1-26, 322.015-2-1, 322.015-2-64 and 322.015-2-65. I refer to these lots hereafter as the "Oneida Textile Lots."

6. A second group of Oneida Nation-owned parcels on Route 5 is used as a gasoline service station known as Oneida Sav-On and is located at the intersection of Sherrill Road and Route 5. An excerpt from the tax map of the City of Sherrill indicating the location of these parcels is attached

as Exhibit 2. The tax parcel numbers for the land occupied by gasoline service station owned by the Oneida Nation are: 322.015-2-40.3; 322.015-2-45.1 and 322.015-2-47.1. I refer to these lots hereafter as the "Oneida Sav-On Lots."

7. I have been asked by the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, LLP, on behalf of the Oneida Indian Nation (the "Nation"), to review title issues relating to the Oneida Textile Lots and the Oneida Sav-On Lots.

8. Using records from the Oneida County Clerk's Office and the Oneida County Surrogate's Court, both located in Utica, New York, records from the New York State Archives in Albany and documents contained in the Report of Special Committee to Investigate the Indian Problem of the State of New York (Albany 1889), also known as the "Whipple Report," title to the Oneida Textile Lots and Oneida Sav-On Lots was traced, owner by owner, from the present back to 1805. This work was performed by both me and/or employees of Monroe-Madison under my direction and subject to my review.

9. I also reviewed the 1794 Treaty of Canandaigua and the 1788 Treaty of Fort Schuyler, which describes the boundaries of the Oneida Nation reservation reserved to the Oneidas by the Treaty of Canandaigua. I have reviewed the boundaries of the Oneida reservation described in the Treaty of Fort Schuyler.

10. I have concluded that the Oneida Save-On Lots and the Oneida Textile Lots are within the boundaries of the reservation described in the Treaty of Fort Schuyler and confirmed in the Treaty of Canandaigua.

11. I have also concluded that:



(a) the Oneida Textile Lots and the Oneida Sav-On Lots remained in the possession of the Oneida Nation, and within the Oneida reservation boundaries, until 1805;

(b) these lands were conveyed to a Cornelius Dockstader, identified as a member of the Oneida Nation, in 1805;

(c) Dockstader then conveyed the lands to a Peter Smith in 1807; and

(d) thereafter, Smith conveyed the lands to others by mesne conveyances until 1997 and 1998, when the lands were reacquired by the Oneida Nation.

I declare under penalty of perjury that the foregoing is true and correct.

September 05, 2000
Wampsville, New York

PAUL A. THOMAS, JR.

**Plaintiff Oneida Indian Nation's Response To Defendant City Of Sherrill's Statement Of Materials Facts, *Oneida Indian Nation v. City of Sherrill, 00 CV 223* (NDNY), September 11, 2000**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

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**ONEIDA INDIAN NATION,**

**Plaintiff,**

**v.**

**Civil Action No. 00-CV-223 (NPM/GLD)**

**CITY OF SHERRILL,**

**Defendant.**

---

**PLAINTIFF ONEIDA INDIAN NATION'S RESPONSE TO DEFENDANT CITY OF SHERRILL'S STATEMENT OF MATERIALS FACTS**

Plaintiff Oneida Indian Nation, by counsel, hereby responds to the Statement of Material Facts submitted by the defendant City of Sherrill.

1. The Nation does not dispute paragraph 1.

2. The Nation does not dispute paragraph 2.

3. The Nation does not dispute paragraph 3, except to the extent that the statement that the Nation "purchased two properties" in Sherrill is intended to suggest that the Nation was not or is not entitled to possess the



properties pursuant to federal treaties, or to suggest that the proprieties were not part of the Oneida reservation. In fact, the Nation simply assumed possession of its property, which was before and at all time a reservation pursuant to, among other treaties, the 1794 Treaty of Canandaigua. Affidavit of Peter D. Carmen in Support of the Nation's Cross-Motion for Summary Judgment, and in Opposition to the Defendant city of Sherrill's Motion for Summary Judgment, or in the Alternative for a Preliminary Injunction ("Carmen Aff."), at ¶¶6-13, exhs. 3-6.

4. The Nation does not dispute paragraph 4, except that it objects to Sherrill's use of the term "purchased," for reasons described in paragraph 3. Carmen Aff. at ¶¶6-13, exhs. 3-6.

5. The Nation disputes paragraph 5. All of the Nation's lands in Madison and Oneida Counties that were part of the Oneida reservation guaranteed by the United States in the Treaty of Canandaigua remain under the jurisdiction of the United States, and subject to restraints against alienation, because Congress has not expressly stated a contrary intention. Carmen Aff. At ¶¶6-13, 18-22, exhs. 3-6, 13-16.

6. The Nation does not dispute the statement in paragraph 6 that the Nation's lands in Sherrill "have not been held in trust by the Federal Government for the benefit of individual members of [the Nation]" (emphasis added). Nor does the Nation dispute the statement that the Nation acquired its lands in Sherrill "by purchasing them from private individuals in voluntary, free market transactions," except with respect to the term "purchasing," as explained in paragraph 3, above. Further, to the extent that Sherrill means to imply that the Oneida lands in Sherrill, as a reservation, are not subject to a trust relationship between the United States and the Nation, under which relationship the lands

remain restricted against alienation and pursuant to which the Nation is entitled to the rights and immunities set forth in governing treaties and under federal law, including the right to be free from taxation of its reservation lands, the Nation denies such implications. Carmen Aff. at ¶¶6-13, 18-22, exhs. 3-6, 13-16.

7. The Nation does not dispute paragraph 7.

8. The Nation does not have sufficient information to admit or dispute paragraph 8. It is reasonable to expect that Sherrill received federal funding, directly or indirectly, for some of the services it provides.

9. The Nation disputes paragraph 9, to the extent that it is intended to suggest that title to the Nation's lands in Sherrill could be lawfully conveyed to Sherrill by tax deed on February 9, 2000. The Nation does not dispute that Sherrill purported to convey title to the properties described in paragraph 9. This conveyance, however, was unlawful, given the reservation and tax-free status of the properties Sherrill sought to convey to itself, and in light of the Nation's sovereign immunity. Carmen Aff. at ¶¶6-13, 18-22, exhs. 3-6, 13-16.

10. Pursuant to Fed.R.Civ.P. 10(c), the Nation incorporates by reference herein its Statement of Material Facts submitted in support of the Nation's cross-motion for summary judgment, filed this same date.

Dated: September 11, 2000 Respectfully submitted,

MACKENZIE SMITH LEWIS MICHELL & HUGHES, LLP



BY:_____
Peter D. Carmen,
Bar Roll No. 501504
101 South Salina Street, Suite 600
P.O. Box 4967
Syracuse, New York 13221-4967

-and-

ZUCKERMAN, SPAEDER, GOLDSTEIN TAYLOR & KOLKER, L.L.P.
BY: William W. Taylor, III
Bar Roll No. 102710
Michael R. Smith
Bar Roll No. 601277
1201 Connecticut Ave., NW
Washington, DC 20036

Attorneys for Oneida Indian Nation

**Oneida Indian Nation's Statement Of Materials Facts, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), September 11, 2000**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

---

**ONEIDA INDIAN NATION,**

**Plaintiff,** **Civil Action No. 00-CV-223 (NPM/GLD)**

**v.**

**CITY OF SHERRILL,**

**Defendant.**

---

**PLAINTIFF ONEIDA INDIAN NATION'S STATEMENT OF MATERIAL FACTS**

1. Plaintiff Oneida Indian Nation of New York ("the Nation") is a federally recognized Indian tribe. Affidavit of Peter D. Carmen in support of Oneida Indian Nation's Cross-Motion for Summary Judgment, and in Opposition to the City of Sherrill's Motion for Summary Judgment, or, in the alternative, for a Preliminary Junction ("Carman Aff."), Exh. 1.

2. The Nation is in possession of two properties, consisting of 10 tax parcels, in Sherrill. Carmen Aff. At ¶5, exh.2.



**A. History of the Lands in Dispute**

3. The Nation's lands in Sherrill were part of the lands possessed by the Nation for centuries before this country was formed, often referred to as "aboriginal" lands. Carmen Aff. at ¶6.

4. The Nation's lands in Sherrill were part of the Oneida reservation guaranteed and confirmed in the 1794 Treaty of Canandaigua. Carmen Aff. at ¶¶9-10, exh. 6; Declaration of Paul A. Thomas, Jr., at ¶10.

5. Congress has done nothing to alter the reservation status of the Nation's lands in Sherrill. Carman Aff. at ¶12.

6. Congress has not modified, eliminated, or terminated the Treaty of Canandaigua, which remains in full force and effect. Carmen Aff. at ¶11.

7. The rights conferred to the Nation by the Treaty of Canandaigua include the right to be free from taxation of the nation's reservation lands. Carmen Aff. at ¶9, exh. 6.

8. Congress has done nothing to alter the tax-free status of the Nation's reservation lands, including its lands in Sherrill. Carmen Aff. at ¶12.

9. The reservation lands that the Nation now possesses in Sherrill were out of the Nation's possession from 1805 to 1997-1998. Carmen Aff. at ¶¶14-15, exhs. 8-10

10. Neither Congress nor the President approved the transactions removing the Nation's lands in Sherrill from its possession. Carmen Aff. at ¶16.

**B. Possession and Subsequent Treatment of the Nation's Lands in Sherrill**

11. The Nation assumed possession of its lands in Sherrill as a result of voluntary, free-market transactions in 1997 and 1998. Carmen Aff. at ¶17. exh. 11.

12. In 1999, the Bureau of Indian Affairs determined that lands reacquired by the Nation in 1997 "cannot be alienated without the express approval of the United States, and are subject to Oneida tribal governmental power." Carmen Aff. at ¶19, exh. 13.

13. The Department of Interior has regularly given approvals for transactions related to repossessed Nation lands under federal laws requiring such approvals to be given where the lands at issue are Indian lands subject to restrictions against alienation. Carmen Aff. at ¶20, exh. 14.

14. The Attorney for the Town of Verona has concluded that Treaty lands returned to the Nation's possession are reservation lands, restricted from alienation and exempt from taxation. Carmen Aff. at ¶21, exh. 15.

15. Sherrill acknowledged the restricted status of the nation's lands in Sherrill when it sought, and obtained, federal approval of a utility easement through the Nation's land. Carmen Aff. at ¶ 22, exh. 15. This approval was pursuant to 25 C.F.R. 169.1(d), which requires federal approval for easements over "land held in trust by the United States for a tribe or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance."

**C. Sherrill's Efforts to Tax the Nation's Lands**

16. Starting in August 1997, the defendant City of Sherrill has undertaken efforts to impose property taxes on the Nation's lands in Sherrill. Carmen Aff. at ¶23.



17. On August 7, 1997, the Sherrill City Clerk sent notices of tax delinquency to the Nation with respect to three of the Nation's 10 Sherrill parcels. Carmen Aff. at ¶24, exh. 17.

18. The notices did not identify the parcels Sherrill was seeking to tax. Id.

19. In response to the Nation's refusal to pay property taxes to Sherrill, Sherrill advertised in a local newspaper the three Nation parcels for a November 5, 1997 tax sale. Carmen Aff. at ¶ 25, exh. 18.

20. Sherrill did not serve on the Nation by mail or personal delivery any notice of the scheduled November 5, 1997 tax sale. Carmen Aff. at ¶26.

21. On November 5, 1997, as advertised, the three Nation parcels were sold at tax sale. Because there were no outside bidders on the property, the City of Sherrill itself purchased the properties. Carmen Aff. at ¶27, exh. 20.

22. Even though the two-year deadline for redemption of the three Nation parcels sold at tax sale began to run on November 5, 1997, Sherrill did not give the Nation notice of the deadline for redemption until November 8, 1999, when it published an announcement in a local newspaper that the Nation had three months, until February 8, 2000, to redeem the three parcels. Carmen Aff. at ¶28, exh. 21.

23. Sherrill served the Nation notice by mail of the February 8, 2000, redemption deadline on January 10, 2000. Carmen Aff. at ¶29, exh. 22.

24. On February 9, 2000, Sherrill recorded a deed conveying the three Nation parcels to itself. Carmen Aff. at ¶30, exh. 23.

25. On February 17, 2000, Sherrill commenced a summary eviction proceeding in its City Court to evict the Nation from its lands. Carmen Aff. at ¶31, exh. 24.

26. Sherrill has also begun to impose, and enforce the nonpayment of, property taxes on the other seven parcels of Nation lands in Sherrill. Four additional Nation parcels were sold by Sherrill to itself at a tax sale on November 5, 1998, and the final three Nation parcels were sold at tax sale by Sherrill to Sherrill on November 10, 1999. Carmen Aff. at ¶32, exh. 25.

27. In each these instances, Sherrill failed to identify in its initial delinquency notices to the Nation the parcels on which taxes were allegedly due, and failed to provide the Nation with direct notice of the impending tax sale. Carmen Aff. at ¶33, exh. 26.

28. With respect to the Sherrill parcels sold at November 5, 1998 and November 10, 1999 tax sales, Sherrill served the Nation with notice by mail of the deadlines for redemption of these properties on March 6, 2000. Carmen Aff. at ¶¶34-35, exh. 27.

Dated: September 11, 2000

Respectfully submitted,

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Attorneys for Oneida Indian Nation

**Plaintiff's Response To Defendant's First Request For Production Of Documents, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), October 30, 2000**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

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**THE ONEIDA INDIAN NATION,**

**Plaintiff,**

**vs.**

**Civil Action No. 00-CV-223 (DNH)(GSP)**

**CITY OF SHERRILL,**

**Defendant.**

**PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Plaintiff Oneida Indian Nation, by counsel, pursuant to Fed. R. Civ. P. 33(b), hereby responds to defendant City of Sherrill's first request for production of documents.

Objections herein are made by counsel.

The Nation objects to the inclusion of "attorneys" in instruction 7 and objects to any request seeking information that is subject to the attorney-client, work product, litigation preparation or deliberative privileges.

The Nation objects that Sherrill has served its document requests after objecting that discovery in this case is "premature."



Most fundamentally, the Nation objects to Sherrill's document requests as a whole on the ground that they seek information that is not relevant or reasonably calculated to lead to the discovery of relevant evidence. The United States recognized the Oneida reservation in the 1794 Treaty of Canandaigua, which the Supreme Court has held remains in full force and effect. County of Oneida v. Oneida Indian Nation, 47 U.S. 226 (1985). The taxability of the land at issue in this case, which is indisputably within the original boundaries of that reservation and is now in the Nation's actual possession, depends exclusively upon whether the Congress of the United States ever changed the reservation status or tax status of that land. Under federal law, Congress' power regarding reservation status and tax status is exclusive. Thus, the only issue in this case is whether Congress has asked to change the reservation or tax status of the Nation's land. Most of Sherrill's document requests do not address any acts or inaction of Congress, presumably because Sherrill already has admitted in its pleadings that Congress never has acted to change the reservation status or tax status of the Nation's land.

Request 1

All documents concerning the acquisition, sale, or transfer of the Oneida Properties, by any person, including but not limited to the terms of each acquisition, sale, or transfer.

Response: Objection. This request is overbroad and vague. It seeks documents that are not relevant or reasonably calculated to lead to the discovery of relevant documents or information. Without waiving these objections, plaintiff will produce its reacquisition agreements and deeds for the referenced properties. See also the materials accompanying the Nation's motion for summary judgment.

Request 2

All documents concerning OIN's acquisition of each of the Properties, including but not limited to: (a) the terms of the each acquisition; (b) the size and location of each of the Properties; (c) the source of the funds for each acquisition; (d) the consideration paid by OIN for each of the Properties; (e) all deeds, titles, or any other documents received by OIN in connection with such acquisition; (f) any restrictions against alienation on each of the Properties; and (g) the ownership interest of any persons or entities other than OIN in each of the Properties.

Response: Objection. This request is overbroad and vague and seeks documents not relevant or reasonably calculated to lead to the discovery of relevant documents or information. Without waiving these objections, plaintiff will produce its reacquisition agreements and deeds for the referenced properties and documents reflecting restrictions against alienation. There are no documents reflecting the ownership interest today of any persons or entities other than the Nation. See the Nation's answer and objections to Sherrill's interrogatories 2 and 7, and the materials accompanying the Nation's motion for summary judgment.

Request 3

All documents concerning who has had ownership of the Properties at any time.

Response: See the objections and response to Request 1, above. See also the Nation's answer and objections to Sherrill's interrogatory 3.

Request 4

All documents concerning the residential use of any of the Properties by any person.



Response: See the response and objections to Request 1, above. See also the Nation's answer and objections to Sherrill's interrogatory 4.

Request 5

All documents concerning the business operation that take place on the Properties, including but not limited to: (a) the name of any enterprise that is or has been operating on the Properties; (b) the identities of individuals who are employed in businesses or enterprises located on each of the Properties; (c) the nature of the businesses or enterprises conducted on each of the Properties; and (d) the revenue generated by the businesses or enterprises located on each of the Properties.

Response: Objection. This request is overbroad and seeks confidential and proprietary information that is not relevant or reasonably calculated to lead to the discovery of relevant evidence. It violates the Nation's sovereign immunity. Without waiving these objections, the Nation directs Sherrill to the Nation's answers and objections to Sherrill's interrogatories 6 and 8.

Request 6

All documents concerning the services provided to each of the Properties by the government.

Response: Objection. This request is vague and seeks documents that are not relevant or reasonably calculated to lead to the discovery of relevant evidence. Without waiving this objection, the Nation directs Sherrill to the Nation's answer and objections to Sherrill's interrogatory 9.

Request 7

All documents concerning the taxation of the Properties, including but not limited to: (a) OIN's alleged exemption or immunity from property taxation; and (b) OIN's alleged exemption or immunity from collecting sales tax on goods sold on the Properties.

Response: Objection. This request is vague and overbroad. Further, as to part (b), the request seeks documents neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Without waiving these objections, the Nation states that its property is not taxable because the United States acknowledged it in the Treaty of Canandaigua to be a part of the Oneida reservation and to be for the Nation's "free use and enjoyment." A copy of the Treaty of Canandaigua accompanied the Nation's motion for summary judgment.

Request 8

All documents received from, sent to, or copied to the government concerning the Properties.

Response: Objection. The request is vague and overbroad and seeks documents that are not relevant and are not reasonably calculated to lead to the discovery of relevant evidence. It has no restrictions as to time, covering hundreds of years, or as to the subject matter. The request also violates the confidential trust relationship between the United States and the Nation. Without waiving these objections, plaintiff will produce all documents since 1990 received from, sent to, or copied to the City of Sherrill, or its agents, concerning taxation of the referenced properties.

Request 9

All documents concerning the governmental recognition of OIN as an Indian tribe for any purpose.



Response: Objection. This request is overbroad and vague and compliance would be unduly burdensome. Further, it seeks documents that are not relevant and are not reasonably calculated to lead to the discovery of relevant evidence. Without waiving these objections, the Nation states that the United States recognizes the Nation as an Indian tribe, as reflected at 63 Fed. Reg. 13298 (March 13, 2000) (attached as Exhibit 1 to the affidavit of Peter D. Carmen in support of the Nation's summary judgment motion), and in the affidavit of Leslie Gay, which the Nation will produce.

Request 10

All documents concerning the governmental recognition of OIN as a representative of the Oneida Indians.

Response: Objection. This request is vague, overbroad and unintelligible. Further, it seeks documents neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Without waiving these objections, the Nation directs Sherrill to the Nation's answer and objections to Sherrill's interrogatory 21 and to document request 10, above.

Request 11

All documents concerning any group or groups of Oneida Indians other than OIN.

Response: Objection. This request is vague, overbroad and unintelligible and imposes an undue burden. It is unlimited in time, or as to subject matter. Further, it seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of relevant evidence.

Request 12

All documents concerning any real property owned, possessed, or held by any group of Oneida Indians including but not limited to the governmental recognition of any real property, whether in New York or any other state, as Indian reservation land.

Response: Objection. This request is vague and overbroad, and compliance would be unduly burdensome. Further, this request seeks documents neither relevant nor likely to lead to the discovery of relevant evidence. It violates the Nation's sovereign immunity. It is unlimited as to time. Without waiving these objections, plaintiff will produce post – 1970 documents reflecting recognition by the United States of land possessed by the Nation as reservation land subject to the Nation's governance and subject to restrictions on alienation.

Request 13

All documents concerning the taxation of any group of Oneida Indians, including but not limited to (a) whether those groups pay taxes on any real property they own, possess, or hold; and (b) whether those groups collect sales tax on any goods sold on any real property they own, possess, or hold.

Response: Objection. This request seeks information neither relevant nor likely to lead to the discovery of relevant evidence. Further, it is vague and overbroad and would create an undue burden. If this request concerns the Oneida Tribe of Indians of Wisconsin, plaintiff has no responsive documents other than, perhaps, newspaper articles.

Request 14



All documents concerning the governmental recognition of any real property as Oneida Indian Nation reservation land.

Response: Objection. The request is vague and overbroad and poses an undue burden. It seeks documents neither relevant nor likely to lead to the discovery of relevant evidence. Without waiving this objection, plaintiff will produce post-1970 document reflecting recognition by the United States of land possessed by the Nation as reservation land subject to the Nation's governance and subject to restrictions on alienation.

Request 15

All documents concerning OIN's proposal to Sherrill of a standstill agreement with respect to taxation of the Oneida Properties.

Response: Objection. This request is vague and overbroad. It seeks documents subject to attorney-client, work product and litigation preparation privileges. It seeks documents that are not relevant or reasonably calculated to lead to the discovery of relevant documents or information. Without waiving these objections, plaintiff will produce all post-1990 correspondence between the Nation's attorneys and Sherrill or its attorneys concerning standstills proposed by the Nation.

Request 16

All documents concerning the formation of the Oneida Indian Nation.

Response: Objection. This request is vague and overbroad and poses an undue burden. It seeks information that is not relevant and is not reasonably calculated to lead to the discovery of relevant evidence. To the extent that the

request is for documents created at or near the time of the Nation's formation many centuries ago, there are not responsive documents.

Request 17

All documents concerning the leader(s) and governing body or bodies or OIN at all times since OIN's formation, including but not limited to: (a) the identities of each and every person currently elected to or otherwise serving as leader(s) or on those governing bodies and all persons formerly serving as leaders or on governing bodies for the last ten years; (b) the duties, responsibilities, and powers of OIN's nation representative since OIN's formation; and (c) the duties, responsibilities, and powers of OIN's men's council and clan mothers at all times since OIN's formation, including the identities of their current members as well as all former members for the last ten years.

Response: Objection. This request is harassing. It is vague and overbroad and poses an undue burden. It seeks irrelevant documents. It seeks documents not reasonably calculated to lead to the discovery of relevant evidence. It violates the sovereign immunity of the Nation. The identities of the current members of the Nation's government are stated in plaintiff's answers to Sherrill's interrogatory 1.

Request 18

All documents concerning the substance of OIN's tribal laws and tribal legal process since OIN's formation.

Response: Objection. This request is vague and overbroad and poses an undue burden. It seeks documents neither relevant nor reasonably calculated to lead to the discovery of relevant documents or information. Without



waiving these objections, plaintiff will produce the ordinance establishing its tribal court, as well as the applicable rules of procedure.

Request 19

All documents concerning events or gatherings related to OIN, including but not limited to tribal meetings, celebrations, and religious ceremonies, at any time.

Response: Objection. This request is vague and overbroad and poses an undue burden. It seeks documents neither relevant nor reasonably calculated to lead to the discovery of relevant documents or information. It violates the Nation's sovereign immunity and its first amendment rights. Without waiving these objections, the Nation also directs Sherrill to the Nation's answer and objections to Sherrill's interrogatory 22.

Request 20

All documents sufficient to show the number and identity of all members of OIN who live: (a) on any federally-recognized reservation; (b) on any of the Oneida Properties; and (c) on any other land in any state, including but not limited to the State of New York.

Response: Objection. This is overbroad and poses an undue burden. It violates the privacy of Nation members and the sovereign immunity of the Nation. It seeks documents neither relevant nor reasonably calculated to lead to the discovery of relevant documents or information.

Request 21

All documents concerning OIN's contention or belief that the Properties were illegally or wrongfully possessed, purchased, sold or transferred by the government or by any

other person, including but not limited to all such contentions and beliefs as set forth in paragraph 9 of the Complaint.

Response: Paragraph 9 of the complaint does not allege illegal or wrongful possession, purchase, sale or transfer. This request is overbroad and seeks information that is not relevant or reasonably calculated to lead to the discovery of relevant evidence. The reservation and tax status of the land at issue in this case cannot be affected by the knowledge of the Nation or any act or omission on its part. The reservation and tax status of the land at issue in this litigation derives from federal treaties and, under federal law, is subject to the exclusion control of the United States Congress, which has never acted to change its reservation and tax status. Such reservation and tax status does not derive from or depend on the illegality of transfers of Oneida land.

Request 22

All documents concerning any effort by one or more Oneida Indians generally, or by OIN specifically, to claim title to, or legal possession of, any lands described by the 1794 Treaty of Canandaigua, as set forth in paragraph 8 of the Complaint.

Response: Objection. Paragraph 8 of the complaint does not allege efforts to claim title to or possession of lands. Further, this request is vague and overbroad and poses and undue burden and seeks information that is not relevant or reasonably calculated to lead to the discovery of relevant evidence. Neither the reservation status nor the tax status of the lands at issue in this case can be affected by the two hundred years of effort to which this request is addressed. The reservation and tax statutes of the land at issue in this case derives from federal treaties, not from various illegal transfers of the land, and, under federal



law, is within the exclusive control of Congress. See the objections to request 21, above. Without waiving these objections, the Nation also directs Sherrill to the Nation's answer and objections to Sherrill's interrogatory 24.

Request 23

All documents concerning treaties and agreements between the Oneida Indians, including but not limited to OIN, and the government, including but not limited to the treaties and agreements themselves and documents concerning the negotiations of those treaties and agreements.

Response: Objection. This request is vague and overbroad and pose an undue burden. It seeks documents that are not relevant and are not reasonably calculated to lead to the discovery of relevant documents or information. Without waiving these objections, plaintiff will produce federal treaties acknowledging the Oneida reservation in central New York.

Request 24

All documents concerning the relocation of OIN, its members, or any other group or groups of Oneida Indians from New York State to other states or territories.

Response: Objection. This request is vague and overbroad and poses an undue burden. It is intended to harass. It sees document neither relevant nor reasonably calculated to lead to the discovery of relevant documents or information. The Oneida Indian Nation never relocated to another state or territory. Documents concerning the formation of the Oneida Indian Tribe of Wisconsin in Wisconsin or of the Oneida of the Thames Band in Canada have nothing to do with the tax and reservation status of the

Oneida Indian Nation's land in New York. See also the Nation's answer and objections to Sherrill's interrogatory 23.

Request 25

All documents identified or referred to in the Complaint.

Response: Objection. This request is vague. Defendant should identify the documents it seeks.

Request 26

All documents referred to in any answer to defendant's interrogatories, served together with this document request.

Response: Objection. This request is vague and overbroad. Defendant should identify the documents it seeks.

Request 27

To the extent they were not produced in response to the above requests, all documents concerning the Oneida Properties.

Response: Objection. This request is vague and overbroad and pose an undue burden. It seeks documents neither relevant nor reasonably calculated to lead to the discovery of relevant evidence. Further, it seeks confidential and proprietary information.

Dated: October 30, 2000 Respectfully submitted,

**MACKENZIE SMITH LEWIS MICHELL & HUGHES, LLP**



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of October, 2000, I caused a copy of the foregoing Request for Admissions to be delivered by first class mail, postage prepaid to:

Ira S. Sacks
Albert Shemmy Mishaan
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

One New York Plaza
New York, NY 10004

Attorneys for Defendant City of Sherrill

Peter D. Carmen



**Defendant City Of Sherrill's Response To Plaintiff Oneida Indian Nation's Statement Of Material Facts, *Oneida Indian Nation v. City of Sherrill*, 00 CV 223 (NDNY), November 13, 2000**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| THE ONEIDA INDIAN NATION,<br>Route 5<br>Vernon, New York 13476,<br><br>Plaintiff,<br><br>vs. | : | Civil Action No. 00-CV-223 (DNH) (GLS) |
| CITY OF SHERRILL,<br>377 Sherrill Road<br>Sherrill, New York 13461,<br><br>Defendant. | : | |

**DEFENDANT CITY OF SHERRILL'S RESPONSE TO PLAINTIFF ONEIDA INDIAN NATION'S STATEMENT OF MATERIAL FACTS**

Defendant City of Sherrill ("Sherrill"), by counsel, hereby responds to the Statement of Material Facts submitted by plaintiff Oneida Indian Nation ("OIN").

1. Sherrill disputes paragraph 1. The Oneida Indian Nation of New York is recognized as an Indian tribe by the Bureau of Indian Affairs ("BIA") solely for eligibility for funding and services from BIA. *See* Reply Memorandum of Law in Further Support of the City of Sherrill's Motion for

Summary Judgment, or in the Alternative for a Preliminary Injunction, and in Opposition to Plaintiff Oneida Indian Nation's Cross- Motion for Summary Judgment ("Sherrill Reply Mem.") at 28, n.17.

2. Sherrill does not dispute paragraph 2.

3. Sherrill does not have sufficient information to admit or dispute paragraph 3.

4. Sherrill does not have sufficient information to admit or dispute paragraph 4.

5. Sherrill disputes paragraph 5. For example, the 1838 Treaty of Buffalo Creek, 7 Stat. 550. *See Oneida Indian Nation of New York State v. County of Oneida, New York*, 2000 WL 1376451 (N.D.N.Y. Sept. 25, 2000) ("*Oneida III*"); Sherrill Reply Mem. at 7-9, 16.

6. Sherrill disputes paragraph 6. For example, the 1838 Treaty of Buffalo Creek, 7 Stat. 550. *See Oneida III*; Sherrill Reply Mem. at 7-9, 16.

7. Sherrill disputes paragraph 7. OIN's reservation land does not extend, if at all, beyond the thirty-two acre reservation in Madison County. OIN reservation land, if any, is not free from all taxation, such as the obligation to collect sales tax. *See* Memorandum of Law in Support of Defendant City of Sherrill's Motion for Summary Judgment, or in the Alternative for a Preliminary Injunction ("Sherrill Mem.") at 14-16.

8. Sherrill disputes paragraph 8. OIN's reservation land does not extend, if at all, beyond the thirty-two-acre reservation in Madison County. OIN reservation land, if any, is not free from all taxation, such as the obligation to collect sales tax. *See* Sherrill Mem. at 14-16.



9. Sherrill disputes paragraph 9. OIN has no reservation land in Sherrill. *See* Sherrill Mem. at 14-16. Sherrill does not have sufficient information to admit or dispute the remaining content of paragraph 9.

10. Sherrill does not have sufficient information to admit or dispute paragraph 10.

11. Sherrill disputes paragraph 11. OIN's Sherrill lands did not belong to OIN prior to OIN's purchase of the lands in 1997 and 1998. OIN acquired these lands by purchasing them on the open market. *See* Peter D. Carmen Affidavit (1) In Support of Oneida Indian Nation's Cross-Motion for Summary Judgment and (2) In Opposition to the City of Sherrill's Motion for Summary Judgment, or in the Alternative for a Preliminary Injunction dated September 11, 2000 ("Carmen Aff.") Ex. 12; Sherrill Reply Mem. at 11-13.

12. Sherrill disputes paragraph 12. In any event, the letter attached as Exhibit 13 of the Carmen Affidavit is in no way related or relevant to the Sherrill lands OIN purchased in 1997 and 1998. *See* Sherrill Reply Mem. At 14, n. 11.

13. Sherrill does not have sufficient information to admit or dispute paragraph 13 and notes that the document referred to in Exhibit 14 of the Carmen Affidavit is in no way related or relevant to the Sherrill lands OIN purchased in 1997 and 1998. *See* Sherrill Reply Mem. at 14, n. 11.

14. Sherrill does not have sufficient information to admit or dispute paragraph 14. In any event, the letter referred to in Exhibit 15 of the Carmen Affidavit is in no way related or relevant to the Sherrill lands OIN purchased in 1997 and 1998. *See* Sherrill Reply Mem. at 14, n.11.

15. Sherrill disputes paragraph 15. Although Sherrill sought and obtained federal approval of the warranty deed by which OIN conveyed to Sherrill a utility easement through OIN's Sherrill lands, in so doing Sherrill did not "acknowledge[ ] the restricted status of [OIN's] land." Indeed, the warranty deed contains no language to that effect. Carmen Aff. ¶ 16. Rather, in an attempt to protect a utility easement beneficial to its citizens, Sherrill sought approval from the BIA solely as the result of the uncertainty and confusion created by OIN's public position that its Sherrill lands are "reservation lands." *See* Affidavit of David O. Barker dated November 3, 2000 ("Second Barker Aff." ) ¶ 14.

16. Sherrill does not dispute paragraph 16.

17. Sherrill does not dispute paragraph 17.

18. Sherrill does not dispute paragraph 18.

19. Sherrill does not dispute paragraph 19.

20. Sherrill disputes paragraph 20. OIN was notified by mail that three of its Sherrill tax parcels could be advertised and sold by Sherrill for non-payment of taxes. *See* Sherrill Reply Mem. at 20. The August 7, 1997 notices of tax delinquency explicitly state that "[t]he Commission may direct the City Clerk to proceed to advertise and sell properties for unpaid taxes due. If you do not wish to have your name and property advertised for tax sale, payment of the unpaid taxes must be received by September 2, 1997." Carmen Aff. Ex. 17.

21. Sherrill does not dispute paragraph 21.



22. Sherrill disputes paragraph 22. *See* Second Barker Aff. ¶ 15, Ex. 11.

23. Sherrill disputes paragraph 23. Sherrill did not service OIN notice by mail of the redemption deadline on January 10, 2000. Instead, on January 10, 2000 Sherrill personally served OIN by serving William Hervey with notices of the redemption deadline for tax parcel numbers 322.014-1-23, 322.014-1-25, and 322.014-1-26. Additionally, OIN was personally served with the notice of redemption for tax parcel number 322.014-1-23 by service on Kathy Perham and copies of the notices of redemption for tax parcel numbers 322.014-1-25 and 322.-14-1-26 were posted on each vacant parcel. Furthermore, the notices of redemption for all three parcels were published in the Daily Sentinel on January 10, 2000. *See* Second Barker Aff. ¶ 15, Ex. 11.

24. Sherrill does not dispute paragraph 24.

25. Sherrill disputes paragraph 25. The summary eviction proceeding in Sherrill City Court was commenced by Sherrill on February 15. 2000. *See* Affidavit of David O. Barker dated July 12, 2000 ("Barker Aff.") Ex. 5.

26. Sherrill does not dispute paragraph 26.

27. Sherrill disputes paragraph 27. OIN was provided with direct notice of the impending tax sale. The August 4, 1998, August 10, 1998, and August 4, 1999 notices of tax delinquency explicitly stated that "[t]he Commission may direct the City Clerk to proceed to advertise and sell properties for unpaid taxes due. If you do not wish to have your name and property advertised for tax sale, payment of the unpaid taxes must be received by September 4, 1998." Carmen Aff. Ex. 26; Second Barker Aff. ¶ 15, Ex. 11.

28. Sherrill does not dispute paragraph 28.

Dated: New York, New York
November 13, 2000

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)

By:_____
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334997





**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| **THE ONEIDA INDIAN NATION** | : |
| **Route 5** | : |
| **Vernon, New York 13476,** | : |
| | : |
| **Plaintiff,** | : **AFFIDAVIT** |
| | : **OF IRA S.** |
| **vs.** | : **SACKS** |
| | :**Civil Action** |
| **No.** | : **00-CV-223** |
| | :**(DNH) (GLS)** |
| **CITY OF SHERRILL,** | : |
| **377 Sherrill Road** | : |
| **Sherrill, New York 13461,** | : |
| | : |
| **Defendant.** | : |

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

Ira S. Sacks, being duly sworn, hereby deposes and says:

1. I am an attorney admitted to practice in the North District of New York and a member of the Firm of Fried, Frank, Harris, Shriver & Jacobson, attorneys for defendant City of Sherrill ("Sherrill"). I submit this affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. This affidavit is based upon personal knowledge, except where otherwise stated.

2. Plaintiff Oneida Indian Nation ("OIN") commenced this proceeding in the Northern District of New York on February 4, 2000, alleging that ten parcels of real property owned by OIN in the City of Sherrill (the "Properties" or the "Sherrill Properties") are located within the Oneida Indian reservation acknowledged in the 1794 Treaty of Canandaigua, and are thus exempt from taxation by Sherrill. On February 15, 2000, Sherrill filed a petition in Sherrill city Court demanding possession of three of the Sherrill properties owned by OIN, upon which Sherrill had foreclosed and executed a Tax Sale Deed. On February 22, 2000, OIN removed the Sherrill City Court proceeding to the Northern District of New York. On June 14, 2000, the two actions were consolidated by Magistrate Judge Gary L. Sharpe, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

3. On July 14, 2000, Sherrill served OIN with a Motion for Summary Judgment, or in the Alternative for a Preliminary Injunction. On September 11, 2000, OIN served Sherrill with opposition papers to Sherrill's motion and filed a Cross-Motion for Summary Judgment. Sherrill remains entitled to summary judgment on its motion. However, if Sherrill's motion for summary judgment is not granted, it is clear that OIN's cross-motion is both premature and raises numerous disputed questions of material fact as to which Sherrill needs and is entitled to discovery.

4. For example, OIN repeatedly states that because Congress allegedly has not modified, eliminated, or terminated the Treaty of Canandaigua, the treaty remains in full force and effect today. *See* Peter D. Carmen Affidavit (1) In Support of Oneida Indian Nation's Cross-Motion for Summary Judgment and (2) In Opposition to the City of Sherrill's Motion for Summary Judgment or in the Alternative for a Preliminary Injunction dated September 11, 2000 ("Carmen Aff.") ¶ 11; OIN's Memorandum of Law (1) In Support of Oneida Indian Nation's Cross-Motion for



Summary Judgment and (2) In Opposition to the City of Sherrill's Motion for Summary Judgment or in the Alternative for a Preliminary Injunction dated September 11, 2000 ("OIN Mem.") at 11. Therefore, OIN argues, Congress has never modified the "reservation status" of the land it acknowledged in the Treaty of Canandaigua as Oneida Indian reservation land. Carmen Aff. ¶ 12; OIN Mem. at 9. These statements raise a host of disputed questions of material fact, and to the extent OIN proffers them in support of its Cross-Motion for Summary Judgment, Sherrill requires extensive discovery, including:

a. All documents relating to whether the Sherrill Properties are located within the boundaries of the reservation acknowledged by Congress in the 1794 Treaty of Canandaigua;

b. Depositions of experts in treaty interpretation and land surveillance concerning whether the Sherrill Properties are located within the boundaries of the reservation acknowledged by Congress in the 1794 Treaty of Canandaigua;

c. All documents relating to whether Congress has ratified or otherwise modified, eliminated, or terminated the Treaty of Canandaigua, through the 1838 Treaty of Buffalo Creek or otherwise; and

d. Deposition of experts concerning whether Congress has ratified or otherwise modified, eliminated, or terminated the Treaty of Canandaigua.

5. Furthermore, OIN asserts that the Sherrill Properties were part of "an overall 100-acre tract of Nation reservation lands…conveyed by certain Oneidas in 1805 into the possession of Cornelius Dockstader." Carmen Aff. ¶ 14, Ex.8. Exhibit 8 of the Carmen Affidavit includes a copy of the document purportedly reflecting the transfer of land from the Oneidas to Dockstader. OIN then asserts that "[i]n 1807, the New York Legislature confirmed Dockstader's title to these lands, which Dockstader then conveyed to Peter Smith." Carmen Aff. ¶ 15, Ex. 9, 10. Likewise, Exhibits 9 and 10 of the Carmen Affidavit include copies of the documents purportedly reflecting the confirmation of Dockstader's title and his subsequent transfer of the land to Smith. To the extent OIN proffers these exhibits in support of its Cross-Motion for Summary Judgment, Sherrill submits they raise disputed questions of material fact requiring discovery, such as:

a. All documents relating to whether the Sherrill Properties were conveyed in the 1805 and 1807 transfers referred to in the Carmen Affidavit;

b. Depositions of experts in treaty interpretation and land surveillance concerning whether the Sherrill Properties were conveyed in the 1805 and 1807 treaties.

6. Next, OIN asserts that the 1805 transfer of land from the Oneida Indians to Dockstader and the subsequent 1807 transfer of land from Dockstader to Smith were neither approved by Congress nor the President. Carmen Aff. ¶ 16. OIN thus concludes that these transfers are "void ab initio." OIN Mem. at 10. Though it is careful not to expressly refer to the Non-Intercourse Act (the "Act") in its memorandum of law, clearly OIN is arguing that the



transfers, because they were allegedly approved by neither Congress not the President, are void because they violated the Act. 25 U.S.C. § 177.

7. To establish a violation of the Act, OIN must show that: "(1) it is or represents an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Acts as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States and the tribe has never been terminated." *The Cayuga Nation of New York v. Cuomo*, 730 F. Supp. 485, 486 (N.D.N.Y. 1990). Sherrill submits that this raises disputed questions of material fact requiring discovery, including:

a. All documents relating to whether OIN has maintained its tribal status and remains an Indian tribe for purposes of the Act;

b. Depositions of OIN members and United States government representatives concerning whether the tribe has maintained its tribal status for purposes of the Act;

c. All documents relating to whether and the extent to which OIN represents the Oneida Indians – that is, whether "Oneida Indian Nation of New York" is actually the correct title of OIN because OIN represents only those Oneida Indians currently living in the State of New York;

d. All documents relating to whether the Sherrill Properties are tribal land under the Act;

e. All documents relating to any treaty affecting the Sherrill properties or the OIN;

f. All documents relating to whether the United States has consented to the alienation of the tribal land;

g. All documents relating to whether the United States has ratified the alienation of the tribal land;

h. All documents relating to whether the alleged reservation has been extinguished or diminished;

i. All documents relating to OIN's delay in asserting rights to the alleged reservation;

j. All documents relating to reliance on OIN's delay in asserting rights to the alleged reservation;

k. All documents relating to injury as a result of OIN's delay in asserting rights to the alleged reservation;

l. Depositions of OIN members and United States government representatives concerning whether the United States has consented to the alienation of the tribal land.

m. All documents relating to whether the trust relationship between the United States and OIN has remained intact; and



n. Depositions of OIN members and United States government representatives concerning whether the trust relationship between the United States and OIN has remained intact.

8. To the extend OIN relies on the letters in Exhibits 13 through 15 of the Carmen Affidavit for its cross-motion, these letters also raise several disputed fact questions concerning whether the government recognizes the Sherrill Properties as subject to OIN's governmental power and to federal restrictions against alienation. Sherrill requires further discovery of:

a. All documents describing, relating to, explaining, or concerning the Canastota, New York land referred to in Exhibit 13, and the circumstances of its acquisition by OIN;

b. Depositions of Franklin Keel and other United States government representatives concerning the Canastota, New York land referred to in Exhibit 13 and the government's position with respect to OIN's governmental power over the land, if any, and whether the land is subject to restriction by the United States government against alienation;

c. All documents describing, relating to, explaining, or concerning the document which is marked Exhibit 14, since the document is unclear, vague, and ambiguous on its face;

d. Depositions of United States government representatives concerning the document which is marked Exhibit 14;

e. All documents relating to the Verona, New York land referred to in Exhibit 15, and the circumstances of its acquisition by OIN; and

f. Depositions of Timothy A. Smith and representatives from the United States government concerning the Verona, New York land referred to in Exhibit 15 and the respective governments' positions with respect to OIN's governmental power over the land, if any, and whether the land is subject to restriction by the United States government against alienation.

9. Additionally, OIN's cross-motion attempts to raise a disputed question of material fact concerning the extent to which OIN members and/or representatives had actual notice of the tax proceedings commenced against it by the City of Sherrill. Sherrill believes the record shows that it is undisputed that OIN had actual notice of the tax proceedings: for example, Sherrill received letters from OIN's outside counsel regarding the tax proceedings, thus showing that OIN had actual knowledge. If this Court believes there is any issue on that score, Sherrill requires further discovery to determine exactly which members of OIN had actual knowledge of the proceedings and exactly when the members of OIN gained such knowledge. Necessary discovery includes depositions of OIN members and/or representatives.



10. Moreover, OIN's cross-motion raises disputed questions of material fact underlying whether OIN is entitled to sovereign immunity with respect to Sherrill's counterclaims in this action. In order to determine whether OIN is entitled to sovereign immunity, Sherrill is entitled to discovery of:

a. All documents relating to whether OIN has consistently and continually maintained its tribal status and remains an Indian tribe such that it may claim sovereign immunity; and

b. Depositions of OIN members and United States government representatives concerning whether OIN has consistently and continually maintained its tribal status and remains an Indian tribe such that it may claim sovereign immunity.

11. Finally, even if every claim in the Carmen Affidavit and the OIN Memorandum are true, Sherrill is entitled to the discovery described above and additional discovery so that it may mount a defense to OIN's claims in support of its Cross-Motion for Summary Judgment on the basis of the doctrines of laches, estoppel, waiver, statute of limitations, unclean hands, consent, extinguishment, diminishment and ratification. There are disputed issues of material fact underlying all of those defenses to OIN's claims of right to the land at issue as tribal land.

12. Sherrill served OIN with a document request and interrogatories on August 9, 2000, in an attempt to obtain facts relevant to the issues raised in OIN's cross-motion. Sherrill granted OIN's request for an extension to respond to these discovery requests until October 30, 2000. OIN produced no documents and failed to sufficiently

respond to Sherrill's interrogatories. Indeed, the objections and responses are tantamount to a refusal to answer. Given the early stage of this litigation, OIN's wholly inadequate responses to Sherrill's discovery requests, and the need for additional documentary discovery, depositions and expert discovery to determine certain of the factual issues outlined above, Sherrill is entitled to substantial discovery before fully opposing OIN's Cross-Motion for Summary Judgment.

Ira S. Sacks
(Bar code No. 510475)

Sworn to before me this
13th day of November, 2000

Notary Public
Marion Roppolo
Notary Public of New York
No. 01P04782244
Qualified in New York County
Commission Expires October 31, 2002

**Approximate Transcription of Statement of Ransom H. Gillet at Oneida Castle, August 9, 1838**

To the chiefs headmen & warriors of the Oneida Indians in New York

In order to prevent all [resistance?] and to counteract all misapprehensions concerning the purport of the treaty concluded between the United States and the New York Indians at Buffalo Creek on the 15th day of January 1838 & which was ratified by the Senate of the United States with amendments which have been this day assented to you by by [sic] the Oneidas at Oneida Castle I hereby most solemnly assure them that the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York to the west of the State of Missouri or elsewhere unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. They can if they choose to do so remain where they are forever. The treaty gives them lands if they go to them & settle there but they need not go unless they wish to. When they wish to remove they can sell their lands to the Governor of the State of New York & then emigrate. But they will not be compelled to sell or remove.

Dated at Oneida Castle
August 9, 1838

RH Gillet
Commissioner

I certify that the above was signed by the Commissioner of the United States
In my presence

Timothy Jenkins



**Petition Of Six Nations Of New York Indians Relating To Kansas Lands, United States Senate, January 27, 1883**

**47th Congress** **SENATE Mis. Doc. No. 38**
**2nd Session**

**PETITION**

**of**

**SIX NATIONS OF NEW YORK INDIANS**

**RELATING TO KANSAS LANDS**

JANUARY 27, 1883.—Referred to the Committee on Indian Affairs.

FEBRUARY 16, 1883 – Reported with accompanying documents. Ordered to be printed and recommitted.

*To the honorable Congress of the United States of America, duly as-*
*sembled:*

ARTICLE 1. We, the undersigned sachems, chiefs, headmen, and warriors of the Six Nations of New York Indians, duly assembled in the Onondaga councilhouse of the Onondaga Reservation, this 12th day of January, 1883, do most humbly and respectfully petition to your honorable body for a relief or our claims in the Kansas lands growing out of the various treaties made in favor of said Six Nations of New York Indians, namely, by the treaty of February 6, 1826; also treaty proclaimed February 23, 1829; also, treaty proclaimed July 9, 1832; and appendix proclaimed March 13, 1835; the above-mentioned known as Menominee treaties; finally by a treaty which was proclaimed April 4, 1840, according to schedule A therein found with the New York Indians as amended by the State and assented to by the

several tribes, concluded at Buffalo Creek, in the State of New York, January 15, 1838.

ART. 2. Your humble petitioner further shows and understand their claims to be thus: that is the Menominee treaty proclaimed February 6, 1826, in article 8, that the Menominee Indians of Green Bay did cede lands to the New York Indians by purchase; the above cession mentioned were finally settled and secured to New York Indians by the United States in the Menominee treaty proclaimed July 9, 1832; also in the preamble of the treaty of 1838 between New York Indians and the United States. In the 3d verse, that the said United States acknowledged that, the Green Bay lands was purchased by the New York Indians, so it was theirs by purchase; and in article 1 by the same treaty, the said Green Bay lands were theirs to cede, and did cede it to the United States. In consideration of the above cession on the part of the tribes of the New York Indians the United States agreed to set apart a tract of country situated west of the State of Missouri, in the Indian Territory, of 1,824,000 acres of land, being 320 acres for each soul of said Indians, which the said Indians have never received, or the equivalent of land ceded in Green Bay, Wis., to the United States.

ART 3. Your humble petitioner would respectfully recommend a relief of their above-mentioned claim, be appropriated as a fund to build a highschool in farm of each tribe of the said Six Nations of New York Indians, and to support the same for the special benefit of the youths of said Six Nations of New York Indians.

ART. 4. Your humble petitioner still further shows that the foregoing council of said Six Nations of New York Indians the following resolution was duly adopted:

*Resolved*, That one copy of above petition be sent to the Commissioner of Indian Affairs, one copy to Secretary of



Interior, one copy to the President of the United States of America.

ADOPTED.

ART. 5. Your humble petitioner shows that by vote of this council duly appoint Andrew John, jr. , as the chairman of the delegates to Washington, D.C., to the proper department of the United States Government for the purpose of presenting the above-mentioned claim, and support the same, to make an early settlement of the within petition; also, the following names appointed delegates with said Andrew John, jr., namely,: Moses Lay, Peter Shongo, in behalf of Seneca Nation; Alexander John, Heman Crow, Cayuga; Abram Hill, Oneida; Daniel Lafort, Tuscarora; Joseph Isaac, Onondagas.

To you we will ever pray.

In witness whereof we hereunto set our hands this 12th day of January, 1883.

SYLVESTER LAY,

*President of the Seneca Nation*

*HIRAM DENNIS,*

*HARRISON HALFTOWN,*

*MARSH PIERCE,*

*WALTER KENNEDY,*

*MOSES LAY,*

*PETER SHONGO,*

*Councilors of the Seneca Nation of Indians,*

ANDREW JOHN, JR.,

ALEXANDER JOHN,

his

HEMAN X CROW,

mark

*Cayuga Chiefs.*

ELIAS JOHNSON,

his

JAMES X PEMPLETON,

mark

*Chiefs of the Tuscerora Nation.*

JOSEPH ISAAC,

his

JACOB X BIGBEAR,

mark

*Chiefs of the Onondogas.*

his

ABRAM X HILL,



mark

his

ABRAM X ILAND,

mark

his

HENRY X POWELS,

mark

his

ELIJAH X LEWIS

Mark

*Chiefs of the Oneidas.*

DANIEL LAFORT,

*President of the Council of the Six Nations of New York Indians.*

LESTER BISHOP,

*Clerk of the Six Nations from Cattarangus Reservation.*

UNITED STATES INDIAN SERVICE.

*New York Agency:*

RANDOLPH, *January 19, 1883.*

I, Benjamin G. Casler, United States Indian agent for this agency, do hereby certify that the foregoing petition of the council of the Six Nations of New York Indians is duly executed, and the delegation duly appointed by the council of the Six Nations to present the same at Washington, D.C., to the President of the United States, the Congress of the United States, the Secretary of the Interior, and the Commissioner of Indian Affairs, consists of the following members: Andrew John, jr., chairman; Mosca Lay, Peter Shongo, Lester Bishop, Senecas; Alexander John, Herman Crow, Cayugas; Abram Hill, Oneida; Elias Johnson, Tuscaroras; Daniel Laporte, Joseph Isaac, Onondagas. All of whom are duly constituted and accredited delegates from the Six Nations of New York Indians to visit the city of Washington, D.C., and present said petition and the claims of said Six Nations for compensation for lands in Kansas as set forth in said petition.

BENJ. G. CASLER,

United States Indian Agent.

DEPARTMENT OF THE INTERIOR

*Washington, February 12, 1883.*

SIR: In reply to the communication received from your committee of the 29th ultimo, inclosing the petition of the Six Nations of New York Indians, in relation to their claim to lands in Kansas for any information or suggestions which this department may wish to communicate, I have the honor to invite your attention to the accompanying copy of report of the 9th instant from the Commissioner of Indian Affairs, to whom the subject was referred.

Very respectfully,



H. M. TELLER,

*Secretary.*

HON. HENRY L. DAWES

*Chairman Senate Committee on Indian Affairs.*

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DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS,

*Washington, February 9, 1883.*

SIR: I am in receipt, by department reference, of a communication from J. R. McCarty, clerk of the Senate Committee on Indian Affairs, dated January 29, 1883, in which he incloses the "petition of the Six Nations of New York Indians relating to Kansas lands," and stated that "the committee will be glad to receive from your department any information or suggestions which you may wish to communicate regarding the subject."

The petition sets forth that by certain treaties between the New York Indians and the Menomonees, the former purchased of the latter certain lands in Wisconsin, which lands were secured to the New York Indians by the treaty between the United States and the Menomonees concluded February 8, 1831 (7 Stat., 342); and that by the treaty of January 11, 1838 (7 Stat. 550), they ceded the lands in Wisconsin acquired from the Menomonees to the United States, in consideration for which the United States agreed to

set apart a tract of country situated west of the State of Missouri in the Indian Territory of 1,824,000 acres of land being 320 acres for each one of said Indians, which lands the said Indians have never received, or the equivalent of land in Wisconsin ceded to the United States. They ask as relief on account of the above claims that a fund be appropriated sufficient to build a high school for each tribe of said Six Nations and to support the same.

The petition is signed by delegates on behalf of the Senecas, Cayuga, Oneidas, Tuscaroras, and Onondagas.

The history of the negotiations between the New York Indians and the Menomonees and Winnebagoes, and the action of the government in connection therewith, may be found in Senate Ex. D.C. No. 189, 27th Congress, 2d session.

By the treaty of February 8, 1831, between the United States and the Menomonees (7 Stat., 342), the latter, although protesting that they were under no obligations to recognize any claim of the New York Indians to any portion of their country, and that they neither sold nor received any value for the land claimed by these tribes, yet agreed that such part of the lands described, as the President might direct, might be set apart as a home to the several tribes of New York Indians who might remove and settle upon the same within three years from the date of the agreement.

By a supplemental agreement concluded February 17, 1831 (7 Stat., 346), this limitation was changed so as to require the President to prescribe the time for removal and settlement.

The claim of the Menomonees that they had not received any value from the New York Indians for the lands in Wisconsin does not appear to be well founded. In the treaty between these Indians, August 18, 1821, approved by



the President, February 9, 1822, the receipt of $500 is acknowledged, and a receipt dated September 16, 1822, acknowledges the payment of $1,500 in goods.

The preamble to the treaty between the United States and the New York Indians concluded January 15, 1838 (7 Stat., 550), recites that, with the approbation of the President of the United Sates, purchases were made by the New York Indians from the Menomonee and Winnebago Indians of certain lands at Green Bay, in the Territory of Wisconsin, and after much difficulty and contention with those Indians concerning the extent of that purchase the whole subject was finally settled by a treaty between the United States and the Menomonee Indians, concluded in February, 1831, to which the New York Indians gave their assent on the 17th of October, 1832; that by the provisions of that treaty 500,000 acres of land were secured to the New York Indians of the Six Nations and the St. Regis tribe as a future home, on condition that they all remove to the same within three years or such reasonable time as the President should prescribe; and that the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, &e., in view of which facts the treaty was made.

By the first article of that treaty the several tribes of New York Indians ceded and relinquished to the United States all their right, title, and interest to the lands secured to them at Green Bay by the Menomonee treaty of 1831, except a certain tract reserved.

By the second article, the United States, in consideration of the above cession and relinquishment, agreed to set apart, as a permanent home for all New York Indians then residing in New York, Wisconsin, or elsewhere, a certain tract of country west of the State of Missouri containing 1,824,000 acres, being 320 acres of each soul of

said Indians as then computed: "To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act" of May 28, 1830 (4 Stat., 411). (The section referred to provides that such lands shall revert to the United States if the Indians become extinct or abandon the same.)

By the third article it was agreed that such of the tribes of the New York Indians as did not accept and agree to remove within five years, "or such other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States."

By the fifteenth article the United States agreed to appropriate the sum of $400,000, "to be applied from time to time under the direction of the President, in such proportions as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands," &e.

This treaty was proclaimed April 4, 1840. Disputes being arisen under it, growing out of the claims of the Ogden Land Company, to the lands in New York, it was modified in some particulars by a treaty with the Seneca Nation, concluded May 20, 1842 (7 Stat., 586), but the modifications do not appear to affect the articles heretofore quoted from.

Contemporaneous history shows that this treaty of 1838 was made, not in the interests of the Indians, but for the benefit of the land company which owned the right of pre-emption in the New York lands, and which, therefore, was anxious to secure the removal of the Indians.



There appeared to be no desire on the part of any considerable number of the Indians to remove, and the idea of the removal of small parties was discouraged by the department.

On the 8th of May, 1845, this office reported to the Secretary of War that a letter had been received representing that a portion of the Senecas, and others of the Six Nations, then ready to remove, were exceedingly anxious on the subject, and wished to know whether the United States intended to aid them in their removal.

It was stated that there were some 4,000 Indians in New York, that about 250 of them desired to remove, and that it was not seen what advantage would arise from the removal of this small number. It was recommended that no action be taken, which was approved by the department.

The sum of $20,477.60 had been appropriated on the 3d of March, 1843, for the removal of New York Indians, this estimate being for 250 persons, and being part of the $400,000 agreed to be appropriated by the fifteenth article of the treaty.

On the 28th of May, 1845, Dr. Peter Wilson, accompanying a delegation of New York Indians, in a communication addressed to the Commissioner of Indian Affairs, asked the following question: " Will those who do not remove within the time (five years) forfeit their claims to the western country. This is an important question, and I desire you to answer it in writing."

I do not find that any answer was given. Other representations regarding the removal having been made, this office, on the 12th of September, 1845, offered to appoint Dr. Abraham Hogeboom an agent for the removal of the Indians.

Dr. Hogeboom accepted the appointment, and on the 7th of November, 1845, informed the office that 260 Indians had been enrolled, and that there appeared to be no doubt of the movement taking place. Ten thousand dollars was sent him on the 4th of that month to assist in the removal of the 260 persons.

On the 8th of December, 1845, he was informed that as the lakes and rivers had frozen over, the party must not start. It appears, however, that Dr. Hogeboom, notwithstanding the positive instructions of this office, started with a party of about two hundred some time in May, 1846, and on the 9th of July, 1846, Agent Harvey reported the arrival of 201 Indians in Kansas. These Indians suffered extremely from destitution and sickness; many of them died, and most of the survivors ultimately returned to New York. No further effort at removal appears to have been made, and only about $13,000 of the $20,477.60 was expended. No further appropriation for the removal of these Indians appears to have been made.

It will be observed that these 201 Indians removed after the expiration of the five years fixed in the treaty. No other time for removal appears to have been named by the President.

This appears to be the only organized attempt at emigration ever made, although various parties claiming to be New York Indians settled in Kansas at different times.

The number of those residing there in March, 1859, was reported to be 303, quite a number of them being Canada and Wisconsin Indians not entitled to lands under the treaty of 1838.

June 16, 1860, patents were issued to 32 New York Indians for 320 acres of land each, in Kansas, which is all the land that has been patented under the treaty of 1838.



On the 4th December, 1868, a treaty was concluded with the New York Indians, by the terms of which they surrendered to the United States all claims severally and in common to land west of Missouri, and all right and claim to be removed there, and for support after removal, and all other claims under the treaty of 1838, except their rights to the reservation then occupied by them. This treaty was not ratified by the Senate.

Senator Buckingham, in his report (see Report No. 145, Forty-first Congress, second session), took the ground "that no right to land in Wisconsin and west of Missouri was ever vested in the New York Indians, except the right of occupancy; that an equivalent for the amount paid by them to the Menomonees for lands in Wisconsin was received by those who removed to and settled upon those lands; that the Indians who never removed to the lands set apart for their permanent residence in Wisconsin, and who never removed to and became located on lands set apart for them west of Missouri, did not comply with the requirements of the treaties, and are not entitled to any interest in the lands nor to their proceeds."

A treaty was concluded with the Tonawanda band of Senecas, November 5, 1857 (11 Stat., 735), by which the Indians relinquished all claims under the treaties of 1838 and 1842, in consideration of which the United States agreed to pay and invest the sum of $256,000 for the said Tonawanda band. This amount is said to be their pro rata share of the $400,000 removal fund and of 320 acres of land each, at $1 per acre.

This treaty, Senator Buckingham says, should not be regarded as a precedent by which the government should be bound or guided, as it authorized the payment of moneys to the members of that band, to which they had no claim under former treaties.

It is true that no right to lands in Kansas, except that of occupancy, ever vested in the New York Indians (except the 32 who received patents), but they were entitled upon occupying the lands to receive a patent therefore in fee simple, subject to the proviso that "such lands shall revert to the United States if the Indians become extinct or abandon the same."

The title which they might acquire by occupancy was a base, qualified, or determinable fee, with only the possibility of reversion, and not the right of reversion in the United States, and therefore all the estate is in the Indians. (See decision of United States district court for the western district of Arkansas, May term, 1870, United States *vs.* Ben. Reese.)

Upon the question of the forfeiture of all rights under the treaty by the failure to remove, I am not so clear as Senator Buckingham appears to have been.

The removal was to take place within five years, or such other time as the President might from time to time appoint.

The phrase "or such other time" would seem to mean an extension of time rather than a limitation; that is, that the President might appoint a time for their removal after the expiration of the five years. Permission was given by this office for the removal of a number not less than 250, after the five years had expired. No time was ever named by the President in which the removal must be made or their rights to the land forfeited; nor was any part of the $100,000 appropriated, except the $20,177.50 before mentioned. It would seem, therefore, that the United States has not performed all the conditions precedent required by the treaty.

On the other hand it does not appear that the Indians, in any considerable numbers, ever manifested a desire of



willingness to remove to the western lands, but on the contrary, opposed such removal, and in view of the fate of the few who did remove, this unwillingness does not appear strange.

In view of all the facts in the case I am inclined to the opinion that the petition of these Indians is entitled to some consideration.

Should they now insist upon their right to remove and occupy the lands under the treaty, I do not think that the government could show such a refusal on the part of the Indians, and such a performance of conditions on its part as would release it from the obligations of the treaty.

It is presumed that all the lands ceded to these Indians by the treaty of 1838, except that patented to the thirty-two Indians hereinbefore referred to, have been disposed of under the general laws providing for the disposition of the public domain, and the proceeds thereof covered into the Treasury of the United States. The government, therefore, is not now in condition to fulfill the stipulations of the treaty regarding removal, if required to do so, and the Indians would seem to be entitled to some compensation in lieu thereof.

The relief prayed for does not appear to be excessive, and is not for the benefit of the Indians individually, but for their advantage and improvement as a race.

I think that a due consideration for them as wards of a powerful nation, and a liberal construction of their rights under treaty stipulations, require that the relief asked for should be granted.

I return the petition and inclose a copy of this report.

Very respectfully, your obedient servant,

H. PRICE,

*Commissioner.*

* * *



**47th Congress, HOUSE OF REPRESENTATIVES**
**2nd Session** **Report No. 2001**

INDIAN TREATY OF BUFFALO CREEK, NEW YORK.

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March 2, 1863. – Referred to the House Calendar and ordered to be printed.

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Mr. SPAULDING, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill H. R. 7559]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 7559) to provide for a settlement with the Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th day of January, 1838, for the unexecuted stipulation of that treaty, respectfully report in favor of the passage of the bill for reasons appearing in the accompanying letter of the Commissioner of Indian Affairs.

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DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS,

*Washington,*

*February 9, 1883.*

SIR: I am in receipt, by department reference, of a communication from J. R. McCarty, clerk of the Senate Committee on Indian Affairs, dated January 29, 1883, in which he inclosed the "Petition of the Six Nations of New York Indians relating to Kansas lands," and state that the "committee will be glad to receive from your department any information or suggestions which you may wish to communicate regarding the subject."

The petition sets forth that by certain treaties between the New York Indians and the Menomonees, the former purchased of the latter certain lands in Wisconsin, which lands were secured to the New York Indians by the treaty between the United States and the Menomonees, concluded February 8, 1811 (7 Stat., 342); and that by the treaty of January 11, 1838 (7 Stat., 550), they ceded the lands in Wisconsin acquired from the Menomonees to the United States, I consideration for which the United States agreed to set apart a tract of country situated west of the State of Missouri, in the Indian Territory, of 1,824,000 acres of land, being 320 acres for each one of said Indians, which lands the said Indians have never received, or the equivalent of land in Wisconsin ceded to the United States.

They ask as relief on account of the above claims that a fund be appropriated sufficient to build a high school for each tribe of said Six Nations and to support the same.

The petition is signed by delegates on behalf of the Senecas, Cayugas, Oneidas, Tuscaroras, and Onondagas.

The history of the negotiations between the New York Indians and the Menomonees and Winnebagoes, and the action of the government in connection therewith, may be found in Senate Ex. Doc. No. 180, Twenty-seventh Congress, second session.



By the treaty of February 8, 1831, between the United States and the Menomonees (7 Stat. 312), the latter, although protesting that they were under no obligations to recognize any claim of the New York Indians to any portion of their country, and that they neither sold or received, any value for the land claimed by these tribes, yet agreed that such part of the lands described as the President might direct might be set apart as a home to the several tribes of New York Indians might remove and settle upon the same within three years from the date of the agreement.

By a supplemental agreement concluded February 17, 1831 (7 Stat., 346), this limitation was changed so as to require the President to prescribe the time for removal and settlement.

The claim of the Menomonees that they had not received any value from the New York Indians for the lands in Wisconsin does not appear to be well founded. In the treaty between these Indians, August 18, 1821, approved by the President February 9, 1822, the receipt of $300 in acknowledged, and a receipt, dated September 16, 1822, acknowledges the payment of $1,500 in goods.

The preamble to the treaty between the United States and the New York Indians concluded January 15, 1838 (7 Stat., 550) recites that, with the approbation of the President of the United States, purchases were made by the New York Indians from the Menomonee and Winnebago Indians of certain lands at Green Bay, in the Territory of Wisconsin, and after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonee Indians, concluded in February, 1831, to which the New York Indians gave their assent on the 17th of October 1832; that by the provisions of that treaty 500,000 acres of land were secured to the New York Indians of the

Six Nations and the St. Regis tribe as a future home, on condition that they all remove to the same within three years or such reasonable time as the President should prescribe; and that the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, Wisc. In view of which facts the treaty was made.

By the first article of that treaty that several tribes of New York Indians ceded and relinquished to the United States all their right, title, and interest to the lands secured by them at Green Bay by the Menomonee treaty of 1831, except a certain tract reserved.

By the second article the United States, in consideration of the above cession and relinquishment, agreed to set apart as a permanent bound for all New York Indians then residing in New York, Wisconsin, or elsewhere, a certain tract of country west of the State of Missouri, containing 1,624,000 acres, being 220 acres for each soul of said Indians as then computed; "To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, deemed in conformity with the provisions of the third section of the act" of May 28, 1830 (4 Stat., 411). (The section referred to provides that such lands shall revert to the United States if the Indians become extinct or abandon the same.)

By the third article it was agreed that such of the tribes of the New York Indians as did not accept and agree to remove within five years, "or much other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States."

By the fifteenth article, the United States agreed to appropriate the sum of $400,000, to be applied from time to time under the direction of the President in such properties as



may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes and supporting themselves the first year after their removal; to encourage and assist them in odnestion and in being taught the cultivate their lands," &e.

This treaty was proclaimed April 4, 1840. Disputes baying arisen under it, growing out of the claims of the Ogden Land Company to the lands in New York, it was modified in some particulars by a treaty with the Seneca Nation, concluded May 20, 1842 (7 Stat., 586), but the modifications do not appear to affect the articles heretofore quoted from.

Contemporaneous history shows that this treaty of 1838 was made, not in the interests of the Indians, but for the benefit of land company which owned the right of pre-emption in the New York lands, and which, therefore, was anxious to secure the removal of the Indians.

There appeared to be no desire on the part o any considerable number of the Indians to remove, and the idea of the removal of small parties was discouraged by the department.

On the fifth day of May, 1845, this office reported to the Secretary of War that a letter had been received representing that a portion of the Senecas, and others of the Six Nations then ready to remove, were exceedingly anxious on the subject, and wished to know whether the United States intended to aid them in their removal.

It was stated that there were some 4,000 Indians in New York, that about 250 of them desired to remove, and that it was not seen what advantage would arise from the removal this small number. It was recommended that no action be taken, which was approved by the department.

The sum of $40,477.60 had been appropriated on the 3d of March, 1843, for the removal of New York Indians, this estimate being for 250 persons, and being part of the $100,000 agreed to be appropriated by the fifteenth article of the treaty.

On the 20th day of May, 1845, Dr. Peter Wilson, accompanying a delegation of New York Indians, in a communication addressed to the Commissioner of Indian Affairs, asked the following questions: "Will those who do not remove within that time (five years) forfeit their claims to the western country? This is an important question, and I desire you to answer it in writing." I do not find that any answer was given.

Other representations regarding the removal having been made, this office, on the 12th of September, 1845, offered to appoint Dr. Abraham Hogeboom an agent for the removal of the Indians.

Dr. Hogeboom accepted the appointment, and on the 7th of November, 1845, informed the office that 260 Indians had been enrolled, and that there appeared to be no doubt of the movement taking place. Ten thousand dollars was sent him on the 4th of that month to assist in the removal of the 260 persons.

On the 8th of December 1845, he was informed that as the lakes and rivers had frozen over the party must not start. It appears, however, that Dr. Hogeboom, notwithstanding the positive instructions of this office, started with a party of almost 800 some time in May, 1846, and on the 9th of July, 1846, Agent Harvey reported the arrival of 201 Indians in Kansas. These Indians suffered extremely from destitution and sickness; many of them died, and most of the survivors ultimately returned to New York. No further effort at removal appears to have been made, and only about $13,000



of the $20,477.50 was expended. No further appropriation for the removal of these Indians appears to have been made.

It will be observed that these 201 Indians removed after the expiration of the five years fixed in the treaty. No other time for removal appears to have been named by the President.

This appears to be the only organized attempt at emigration ever made, although various parties claiming to be New York Indians settled in Kansas at different times.

The number of those residing there in March, 1859, was reported to be 303, quite a number of them being Canada and Wisconsin Indians not entitled to leads under the treaty of 1838.

June 15, 1800, patents were issued to 32 New York Indians for 320 acres of land each, I Kansas, which is all the land that has been patented under the treaty of 1838.

On the 4th of December, 1808, a treaty was concluded with the New York Indians, by the terms of which they surrendered to the United States all claims severally and in common to lands west of Missouri, and all right and claim to be removed there, and for support after removal, and all other claims under the treaty of 1838, except their rights to the reservation then occupied by them. This treaty was not ratified by the Senate.

Senator Buckingham, in his report (see Report No. 145, Forty-first Congress, second session), took the ground "that no right to land in Wisconsin and west of Missouri was ever vested in the New York Indians, except the right of occupancy; that an equivalent for the amount paid by them to the Monomonees for lands in Wisconsin was received by those who removed to and settled upon those lands; that the

Indians who never removed to the lands set apart for their permanent residence in Wisconsin, and who never removed to and become located on lands set apart for them west of Missouri, did not comply with the requirements of the treaties, and are not entitled to any interest in the lands nor to their proceeds."

A treaty was concluded with the Tonawanda band of Senecas, November 5, 1557 (11 Stat., 735), by which the Indians relinquished all claims under the treaties of 1838 and 1842, in consideration of which the United States agreed to pay and invest the sum of $66,000 for the said Tonawanda band. This amount is understood to be their pro rata share of the $400,000 removal fund, and of 320 acres of land each at $1 per acre.

This treaty, Senator Buckingham says, should not be regarded as a precedent by which the government should be bound or guided, as it authorized the payment of moneys to the members of that band, to which they had no claim under former treaties.

It is true that no rights to lands in Kansas, except that of occupancy, ever vested in the New York Indians (except the thirty-two who received patents), but they were entitled, upon occupying the lands, to receive a patent therefore in fee simple, subject to the proviso that "such lands shall revert to the United States if the Indians become extinct or abandon the same."

The title which they might acquire by occupancy was a base, qualified, or determinable fee, with only the *possibility* of reversion, and not the *right of reversion* in the United States, and therefore, all the estate is in the Indians (see decision of United States district court for the western district of Arkansas, May term, 1870, United States *vs.* Ben Reese).



Upon the question of the forfeiture of all rights under the treaty by the failure to remove, I am not so clear as Senator Buckingham appears to have been.

The removal was to take place within five years or such other time as the President might from time to time appoint.

The phrase "or such other time" would seem to mean an extension of time rather than a limitation; that is, that the President might appoint a time for their removal after the expiration of the five years. Permission was given by this office for the re [cut off in copy from microfilm]

82d Congress, SENATE — Report

1st Session — No. 910

**IN THE SENATE OF THE UNITED STATES**

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July 12, 1892.—Ordered to be printed.

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Mr. PLATT, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany S. 3407.]

The Committee on Indian Affairs, to whom was referred the finding of the Court of Claims in the case of the New York Indians, etc. *vs.* The United States, make the following report:

The finding of the Court of Claims is as follows:

[Court of Claims. Congressional case No. 151. The New York Indians, being those Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York on the 15th day of January, 1838, *vs.* The United States.]

At a Court of Claims held in the city of Washington on the 11th day of January, A.D. 1892, the court filed the following findings of fact, to-wit:

The claim or matter in the above-entitled case was transmitted to the court by the Committee on Indian Affairs of the Senate of the United States, the 21st day of June, 1884.



James B. Jenkins, Henry E. Davis, Guion Miller, esqs. (with whom was George Barker, esq.), appeared for claimants, and the Attorney-General by F. P. Dewees, esq. his assistant and under his direction, appeared for the defense and protection of the interests of the United States.

The following is the letter transmitting the cause to this court:

UNITED STATES SENATE COMMITTEE ON CLAIMS,

*June 21, 1884.*

At a meeting of the Committee on Indian Affairs of the Senate of the United Sates the following order was made by that committee:

*Ordered*, That Senate bill (S. 467) to provide for a settlement with the Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th day of January, 1838, for the unexecuted stipulation of that treaty, together with the accompanying amendment intended to be proposed by Mr. Voorhees to the aforesaid bill, which bill and proposed amendment were referred to said committee at the first session of the Forty-eighth Congress, and which bill and proposed amendment are now pending before said committee, be transmitted (in accordance with the provisions of an act entitled "An act to afford assistance and relief to Congress and the Executive Department in the investigation of claims and demands against the Government," approved March 3, 1883), to the Court of Claims of the United States, together with the vouchers, papers, proofs, and documents appertaining thereto, for the investigation and determination of the facts involved in said bill said proposed amendment thereto.

J R. MCCARTY,

*Clerk to the United States Senate Committee on Indian Affairs.*

All questions relative to the proposed amendment to the Senate bill mentioned in said letter were abandoned by counsel at the beginning of the argument, and it was stated that an agreement had been reached upon its subject-matter.

The case having been brought to a hearing on the 25th day of November, 1891, the court, upon the evidence and after considering the briefs and arguments of counsel on both sides, find the facts to be as follows:

I.

In 1784 the United States by treaty secured the Oneida and Tuscarora Nations in the possession of the lands upon which they were settled, and fixed the boundaries of the lands of the Six Nation, it being agreed by the United States that the Six Nations should be secured in the peaceful possession of the lands they then inhabited east and north of the boundaries fixed.

The stipulations of this treaty were renewed and confirmed in 1789 when the boundary was again described in the same terms as in the treaty of 1784 and the Indians relinquished and ceded to the United States the lands west of the defined boundary. The Mohawks were not parties to the treaty of 1789.

In 1794 another treaty was concluded with the Six Nations guaranteeing peace and friendship perpetual between



the parties, acknowledging the lands reserved to the Oneida, Onondago, and Cayuga Nations in their treaty with the State of New York to be their property, and engaging that the United States would never claim the same or disturb them or either of the Six Nations nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof, but the said lands should remain theirs until they chose to sell the same to the United States, who "have the right to purchase." The land of the Seneca Nation is also described by metes and bounds in this treaty, acknowledged as their property, and confirmed as theirs until they choose to sell to the United States, who "have the right to purchase," and the United States having thus described and acknowledged the lands of the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same nor disturb the Six Nations in the free use and enjoyment thereof, the Six Nations upon their side engaged never to claim any other lands within the boundaries of the United States.

II.

The New York Indians in 1810 petitioned the President of the United States for leave to purchase reservations of their western brethren with the privilege of removing to and occupying the same. Thereupon, with the approbation of the President, lands situated at Green Bay, Wis., was purchased by the said New York Indians from the Monomonee and Winnebago tribes.

III.

In 1821 the Monomonee Indians ceded to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations two large tracts of land in Wisconsin for a small money consideration. The title to one of those tracts was

confirmed in the New York Indians by the President March 13, 1823.

IV.

Thereafter certain New York Indians belonging to the Oneida, St. Regis, Munsee, and Brothertown tribes removed to and took possession of the lands in Wisconsin. Subsequently questions of tenure and boundaries of the lands granted to the New York Indians were raised by the Menomonees, negotiations were had, and steps were taken through which the purchase by the New York Indians from the Menomonees and Winnebagos was so reduced as to include only 500,000 acres of land on the south and west of the Fox River, together with three townships on the north and east of said river, comprising 80,120 acres, which was to be set apart for the Stockbridge, Munsee, and Brothertown tribes, to all of which the New York Indians duly assented, and thereafter the title to the said three townships and the said 500,000 acres was recognized by the Congress and the President of the United States to be in the New York Indians. In the treaty of February 8, 1831, with the Menomonee Indians it was agreed that certain land in Wisconsin might be set apart as a home to the several tribes "of New York Indians who may remove to and settle upon the same within three years from the date of this agreement."

This treaty was assented to by the New York Indians, October 17, 1832, and by amendment later introduced by agreement between the United States and the Menomonee Indians, the removal of those of the New York Indians who might not be settled on the lands at the end of three years was left discretionary with the President of the United States. A small portion of the New York Indians removed to the Wisconsin or Green Bay lands.



In the treaty with the Monomonees, *supra,* appears at the end of article 1 the following:

"It is distinctly understood that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall from time to time think proper to adopt."

V.

The title of the New York Indians as set forth in the fourth finding has since been acknowledged by the United States; as in the treaty with the Menomonees of September 3, 1836, in the treaty with the Stockbridge and Munsees, of September 3, 1839; in the treaty with the New York Indians concluded at Buffalo Creek January 15, 1838,; and in the treaty with the Tonawanda band of Senecas of November 5, 1857.

VI.

From the preceding findings it appears as a fact that prior to February, 1831, the claimants, with the approbation of the President, had purchased from the Menomonee and Winnebago Indians certain lands near Green Bay in the then Territory of Wisconsin; that a question had arisen as to the extent of this purchase, which was finally settled by treaty between the Menomonees and the United States in February, 1831 (ratified in 1832, which treaty contained a provision securing to c laimants, in consideration of $20,000, 500,000 acres of land at Green Bay (in addition to the townships set apart for the Stockbridge, Munsee, and Brothertown tribes), on condition that they should remove to the same within three years or such reasonable time as the President of the United States should prescribe.

VII.

In January, 1838, the claimants had not all removed to the lands in Wisconsin, but had been prevented from doing so by reasons accepted as sufficient by the President of the United States.

VIII.

Prior to the month of January, 1838, the claimants applied to the President of the United States to take their Green Bay lands and provide them a new home in the Indian Territory. Pursuing the Government policy in removing the Indians to the west of the Mississippi, the President acted upon the application of the Indians by making with them the treaty (known as the treaty of Buffalo Creek) of January 15, 1838.

IX.

The treaty of Buffalo Creek provided, in consideration of the premises recited in the foregoing three findings and of the covenants contained in the treaty itself to the performed by the United States, that the claimants cede and relinquish to the United States all their right, title, and interest in and to their Green Bay lands (excepting a small reservation), and in consideration of this cession and relinquishment the United States, in and by the treaty, agree and guarantee as follows:

First, to set apart as a permanent home for all of the claimants having no permanent homes a certain tract of country west of the Mississippi River, described by metes and bounds and to include 1,824,000 acres of land: to have and to hold the same in fee simple to the said tribes or nations of Indians by patent from the President of the United States, in conformity to the provisions of section 3 of the act of Congress of May 28, 1830, entitled "An act to provide for an



exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi;" the same to be divided among the different tribes, nations, or bands in severalty; it being understood that the said country was intended as a future home for the following tribes: The Senecas, Onondagas, Cayugas, Tuscarorsa, Oneidas, St. Regis, Stockbridge, Munsees, and Brothertowns, and was to be divided equally among them according to the number of individuals in each tribe, as set forth in a schedule annexed to the treaty and designated as Schedule A, on condition that such of the claimants as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart. The following is the Schedule A:

*Census of the New York Indians as taken in 1837.*

Number residing on the Seneca reservations:

| | |
|---|---|
| Senecas | 2,309 |
| Onondagas | 194 |
| Cayugas | 130 |
| | 2,633 |

| | |
|---|---|
| Onondagas, at Onondaga | 300 |
| Tuscaroras | 273 |
| St. Regis in New York | 350 |
| Oneidas at Green Bay | 600 |

Oneidas in New York .....620

Stockbridges .....217

Munsees .....132

Brothertowns .....360

Second. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes, and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Third. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourth. The United States agreed to pay to the several tribes and nations of the claimants hereinafter mentioned, on their removal west the following sums, respectively, namely: To the St. Regis tribe, $5,000; to the Seneca Nation, the income, annually, of $100,000 (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayugas, $2,500 cash and the annual income of $2,500; to the Onondagas, $2,000 cash and the annual income of $2,500; to the Oneidas, $6,000 cash, and to the Tuscaroras, $3,000.

Fifth. The United States agreed to appropriate the sum of $400,000, to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their



lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts. It does not appear that application was made by the tribes or bands or any of them to the Government for removal to the Kansas lands, except as appears in Finding XV below. Article 3 of this treaty of Buffalo Creek provides that such of the tribes of the New York Indians as did not accept and agree to remove to the country set apart for their new home within five years, or such other time as the President might appoint, should forfeit to the United States all interest in the lands so set apart. By supplemental article the St. Regis Indians assented to the treaty with this stipulation, viz:

And it is further agreed that any of the St. Regis Indians who wish to do so shall be at liberty to remove to the "said country at any time hereafter within the time specified in this treaty, but the Government shall not compel them to remove."

The treaty of January 15, 1838, as amended by the Senate June 11, 1838, was assented to September 28, 1838, by the Seneca tribe of New York Indians; August 9, 1838, by the chiefs of the Oneida tribe; August 3, 1838, by the Tuscaroa Nation residing in New York; August 30, 1838, by Cayuga Indians residing in New York; October 9, 1838, by the St. Regis Indians residing in New York; August 31, 1838, by the Onondaga tribe of Indians on the Seneca reservations in the State of New York.

There is no evidence before the court that the Onondagas at Onondaga (300), Oneidas at Green Bay (600), Stockbridges (217), Munsees (132), Brothertowns (300), ever assented to the treaty as amended by the Senate June 11, 1838.

X.

In the year 1838, at the time of the making of the treaty of Buffalo Creek, the Six Nations of New York Indians, designated by that name in the treaty, consisted of six separate nations or tribes known and named as the Senecas, the Onondagas, the Oneidas, the Cayugas, the Tuscaroras, and the St. Regis; and each of said nations or tribes, except the Cayugas, owned and possessed a reservation of land in the State of New York on which the members of said tribes resided, and the right to occupancy to which was secured to them by treaty stipulations. The Cayuga Indians had no separate reservation of their own in the State of New York, but made their home with and resided upon the reservation and lands possessed by the Seneca Nation with the consent of the latter.

XI.

The lands occupied by the Seneca Nation in the State of New York, as set forth in the last preceding finding, consisted of four separate and distinct reservations, named:

The Buffalo Creek Reservation in Erie County, containing 49,920 acres; the Cattaraugus Creek Reservation, containing 21,680 acres; the Alleghany Reservation, containing 30,469 acres, and the Tonawanda Reservation, in Genesee County, containing 12,800 acres. The lands, occupied by the Tuscarora Indians were situated in Niagara County, N.Y., and comprised 6,249 acres. The lands occupied by the Onondaga tribe were situated in Onondaga County, N.Y., and comprised 7,300 acres. The lands occupied by the Oneida tribe were situated in Oneida and Madison counties, N.Y., and comprised 400 acres. The reservation and lands occupied by the St. Regis tribe were situated in Franklin County, N.Y., and comprised about 14,000 acres.



XII.

For many years prior to the making of the treaty of Buffalo Creek in 1838, the said several nations or tribes of Indians had improved and cultivated their lands, on which they resided and from the products of which they chiefly sustained themselves.

XIII.

At the time of the making of the treaty of Buffalo Creek in 1838, one Thomas L. Ogden and one Joseph Fellows, both residents of the State of New York, claimed to be the assignees of the State of Massachusetts and owners of the preemptive right of purchase from the Seneca Nation of the several reservations of land occupied by them as above set forth, which preemptive right had been secured to the Commonwealth of Massachusetts by a convention of the States of New York and Massachusetts, held on the 6th day of December, 1786. The claims at the said Ogden and Fellows were recognized and provided for in the said treaty of Buffalo Creek and the treaty supplementary thereto, which was entered into between the United States and the said Six Nations on the 20th day of May, 1842. After the ratification of said treaty of 1843, which was proclaimed on the 26th day of August in that year, the Seneca Nation surrendered to said Ogden and Fellows the possession of the Buffalo Creek Reservation aforesaid, and the said nation has since continued to occupy the Cattaraugus and Alleghany reservations mentioned in said treaties of 1838 and 1842.

XIV.

The President of the United States never prescribed any time for the removal of the claimants or any of them to the lands or any of them set apart by the treaty of Buffalo Creek.

XV.

No provision of any kind was ever made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo Creek, and of this number only 32 ever received patents or certificates of allotment of any of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation and in conformity with such desire said Hogeboom was appointed a special agent of the Government to remove the said Indians to Kansas.

The sum of $9,464.08 of amount appropriated by Congress was expended in the removal of a party of New York Indians under his direction in 1846.

From Hogeboom's muster roll in the Indian Office it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; the number, thus reduced to 191, arrived in Kansas June 15, 1846, 17 other Indians arrived subsequently; 62 died, and 17 returned to New York.

It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas.

XVI.

The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sole or



otherwise disposed of and conveyed the same and received the consideration therefore.

XVII.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek were afterwards surveyed and made part of the public domain, and were sold or otherwise disposed of by the united States, which received the entire consideration therefore; and the said lands thereafter were and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of the said lands as were sold was at the rate of $1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about $1.22 per acre.

XVIII.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857,in consideration of the release by the said band of its claims upon the United States to the lands west of the State of Missouri, all right and claim to be removed thither and for support and assistance after removal and all other claims against the united States under the treaties of 1838 and 1842 (reserving their rights to moneys paid or payable by Ogden & Fellows), agreed to pay and invest, and did pay and invest for said band the sum of $256,000. This amounted in substance to compensating the beneficiaries of the treaty of 1838 at the rate of $1 per acre for their claims to lands in Kansas, under said treaty, and also their proportionate share of the $400,000 provided to be appropriated in that treaty.

XIX.

After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory known as the New York Indian Reserve should be surveyed with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. After this and before the proclamation of the President and said lands as part of the public domain (December 3 and 17, 1860) the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting the in the powers of attorney that the United States had seized upon the said lands contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof; the said Indians have steadily since asserted their said claims.

XX.

Of the sum of $400,000 agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes mentioned in the ninth finding above, only the sum of $20,477.50 was so appropriated (except as hereinafter stated). Of this sum only $9,464.08 was actually expended; this sum was expended for the removal, more than five years after the ratification of the treaty, of some of the 260 individuals mentioned in the fifteenth finding above,; but in addition to said sum of $9,464.08 there was paid for the Tonoawanda band of Seneca $256,000, as mentioned in the eighteenth finding above.

XXI.

The records of the Indian Office do not show that the President ever prescribed any time for the removal of the New York Indians to Wisconsin under the treaties of February 8, 1831, and October 27, 1832, or that the President



prescribed any time for the removal of the New York Indians from Wisconsin and New York to the Kansas lands under the treaty of Buffalo Creek (January 15, 1838), or that the Government took any steps to defend those Indians who did remove to Kansas "in the peaceable possession of their new homes."

XXII.

The account under the treaty of Buffalo Creek may thus be stated (omitting all questions of law and as to interest and without deciding that the United States are or are not responsible for any portion thereof):

Credit the tribes with---

1,824,000 acres of land in Kansas, at

$1 per acre.....$1,824,000.00

Amount named in articles 9 to 14, both inclusive, of the treaty of Buffalo Creek (except the $100,000 for the Seneca Nation, which had been taken into the account in other dealings between the United States and that nation respecting the claims of Ogden and Fellows) ..... 23,000.00

Amount named in article 15 of the treaty ..... 400,000.00

..... 2,247,000.00

Debit the tribes with---

Amount expended in removing the portion of the 206 individuals mentioned in finding 15 ..... 9,464.08

10,240 acres allotted to the 32 mentioned in finding 15, at $1 per acre..... 10,240.00

| | |
|---|---|
| Amount invested for Tonawanda band | 256,000.00 |
| | 275,704.08 |
| Balance | 1,971,295.92 |

BY THE COURT.

Filed January 11, 1892.

A true copy.

Test, this 16th day of January, A.D. 1892

[SEAL.] JOHN RANDOLPH,

*Assistant Clerk, Court of Claims.*

It will be observed that this finding was made under the so-called "Bowman act," and deals only with facts. Upon the facts as found questions of law arise as to whether the United States is liable for a money payment to the claimants; and, if so, the amount thereof. These questions, in the opinion of the committee, should be determined by a court where they can all be carefully considered and decided. The committee therefore recommends the passage of the accompanying bill conferring jurisdiction on the Court of Claims to hear and determine the case.

The claimants demand interest on the value of their lands in Kansas, which were set apart for them with a view of their removal thereto, from 1843, or certainly from the year 1860, when the United States proclaimed the Kansas lands open to settlement. But in the judgment of the committee



this case is not one in which interest should be allowed against the Government.

The bill is therefore so drawn as to exclude the payment of interest upon any sum that may be found due by the Court of Claims.

**52d Congress,** **SENATE**

**1st Session** **Mis. Doc. No. 46**

IN THE SENATE OF THE UNITED STATES.

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January 18, 1892.—Referred to the Committee on Appropriations and ordered to be printed.

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# FINDINGS FILED BY THE COURT OF CLAIMS IN THE CASE OF THE NEW YORK INDIANS vs. THE UNITED STATES.

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[The New York Indians, being those Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York, January 16, 1892, vs. The United States. Congressional case, No. 151.]

COURT OF CLAIMS, CLERK'S OFFICE.

*Washington, January 16, 1892.*

SIR: Pursuant to the order of the court I transmit herewith a certified copy of the findings filed by the court in the aforesaid cause, which case was referred to this court by the Committee on Indian Affairs, United States Senate, under the act of March 3, 1883.



I am, very respectfully, yours, etc.,

JOHN RANDOLPH,

*Assistant Clerk, Court of Claims.*

Hon. LEVI P. MORTON.

*President of the Senate of the United States.*

---

[Court of Claims Congressional case No. 151. The New York Indians, being those Indians who were parties to the treaty concluded at Buffalo Creek, in the State of New York, on the 16th day of January, 1892, vs. The United States.]

At a Court of Claims held in the city of Washington on the 11th day of January, A.D., 1892, the court filed the following findings of fact, to wit:

The claim or matter in the above-entitled case was transmitted to the court by the Committee on Indian Affairs of the Senate of the United States, the 21st day of June, 1884.

James B. Jenkins, Henry E. Davis, Guion Miller, esqs. (with whom was George Barker, esq.),. appeared for claimants, and the Attorney-General, by F.P. Dewees, esq., his assistant and under his direction, appeared for the defense and protection of the interests of the United States.

The following is the letter transmitting the cause to this court:

UNITED STATES SENATE
COMMITTEE ON CLAIMS.

*June 21, 1884.*

At a meeting of the Committee on Indian Affairs of the Senate of the United States the following order was made by that committee:

*Ordered,* That Senate bill (S. 467) to provide for a settlement with the Indians who were parties as to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th day of January, 1838, for the unexecuted stipulation of that treaty, together with the accompanying amendment intended to be proposed by Mrs. Voorhees to the aforesaid bill, which bill and proposed amendment were referred to said committee at the first session of the Forty-eighth Congress, and which bill and proposed amendment are now pending before said committee, be transmitted (in accordance with the provisions of an act entitled "An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government," approved March 3, 1883), to the Court of Claims of the United States, together with the vouchers, papers, proofs, and documents, appertaining thereto, for the investigation and determination of the facts involved in said bill and said proposed amended thereto.

J. R. McCarty,

*Clerk to the United States Senate Committee on Indian Affairs.*



All questions relative to the proposed amendment to the Senate bill mentioned in said letter were abandoned by counsel at the beginning of the argument, and it was stated that an agreement had been reached upon its subject-matter.

The case having been brought to a hearing on the 25th day of November, 1891, the court, upon the evidence and after considering the briefs and arguments of counsel on both sides, and the facts to be as follows:

I.

In 1784 the United States by treaty secured the Oneida and Tuscarora Nations in the possession of the lands upon which they were settled, and fixed the boundaries of the lands of the Six Nations, it being agreed by the United States that the Six Nations should be secured in the peaceful possession of the lands they have inhabited east and north of the boundaries fixed.

The stipulations of this treaty were renewed and confirmed in 1789 when the boundary was again described in the same terms as in the treaty of 1784 and the Indians relinquished and ceded to the United States the land west of the defined boundary. The Mohawks were not parties to the treaty of 1789.

In 1794, another treaty was concluded with the Six Nations guaranteeing peace and friendship perpetual between the parties, acknowledging the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their treaty with the State of New York to be their property, and engaging that the United States would never claim the same or disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof, but the said lands should remain theirs until they chose to sell the same to the United States, who "have the

right to purchase." The land of the Seneca Nation is also described by metes and bounds in this treaty acknowledged as their property and confirmed as theirs until they chose to sell to the United States, who "have the right to purchase," and the United States having thus described and acknowledged the lands of the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same nor disturb the Six Nations in the free use and enjoyment thereof, the Six Nations upon their aide engaged never to claim any other lands within the boundaries of the United States.

II.

The New York Indians in 1810 petitioned the President of the United States for leave to purchase reservations of their western brethren with the privilege of removing to and occupying the same. Thereupon, with the approbation of the President, land situated at Green Bay, Wis., was purchased by the said New York Indians from the Menomonee and Winnebago tribes.

III.

In 1821 the Menomonee Indians ceded to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations two large tracts of land in Wisconsin for a small money consideration. The title to one of those tracts was confirmed in the New York Indians by the President March 13, 182?.

IV.

Thereafter certain New York Indians belonging to the Oneida, St. Regis, Munsee, and Brothertown tribes removed to and took possession of the lands in Wisconsin. Subsequently questions of tenure and boundaries of the lands



granted to the New York Indians were raised by the Menomonees, negotiations were had, and steps were taken through which the purchase by the New York Indians from the Menomonees and Winnebagos was so reduced as to include only 500,000 acres of land on the south and west of the Fox River, together with three townships on the north and east of said river, comprising 30,120 acres, which was to be set apart for the Stockbridge, Munsee, and Brothertown tribes, to all of which the New York Indians duly assented, and thereafter the title to the said three townships and the said 500,000 acres was recognized by the Congress and the President of the United States to be in the New York Indians. In the treaty of February 8, 1831, with the Menomonee Indians it was agreed that certain land in Wisconsin might be set apart as a home to the several tribes "of New York Indians who may remove to and settle upon the same within three years from the date of this agreement."

This treaty was assented to by the New York Indians, October 17, 1832, and by amendment later introduced by agreement between the United States and the Menomonee Indians, the removal of those of the New York Indians who might not be settled on the lands at the end of three years was left discretionary with the President of the United States. A small portion of the New York Indians removed to the Wisconsin or Green Bay lands.

In the treaty with the Menomonees, *supra*, appears at the end of article 1 the following:

"It is distinctly understood that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure as Congress and the President of the United States shall from time to time think proper to adopt."

V.

The title of the New York Indians as set forth is the fourth finding has since been acknowledged by the United States; as in the treaty with the Menomonees of September 3, 1836, in the treaty with the Stockbridges and Munsees, of September 3, 1839; in the treaty with the New York Indians concluded at Buffalo Creek January 15, 1838,; and in the treaty with the Tonawanda band of Seneca of November 5, 1857.

VI.

From the preceding findings it appears as a fact that prior to February, 1831, the claimants, with the approbation of the President, had purchased from the Menomonee and Winnebago Indians certain lands near Green Bay, in the then Territory of Wisconsin; that a question had arisen as to the extent of this purchase, which was finally settled by treaty between the Monomonees and the United States in February, 1831 (ratified in 1832), which treaty contained a provision securing to c laimants, in consideration of $20,000, 500,000 acres of land at Green Bay (in addition to the townships not apart for the Stockbridge, Munsees, and Brothertown tribes), on condition that they should remove to the same within three years or such reasonable time as the President of the united States should prescribe.

VII.

In January 1838, the claimants had not all removed to the lands in Wisconsin, but had been prevented from doing so by reasons adopted as sufficient by the President of the United States.

VIII.



Prior to the month of January, 1838, the claimants applied to the President of the United States to take their Green Bay lands and provide them a new home in the Indian Territory. Pursuing the Government policy in removing the Indians to the west of the Mississippi, the President acted upon the application of the Indians by making with them the treaty (known as the treaty of Buffalo Creek) of January 15, 1838.

IX.

The treaty of Buffalo Creek provided, in consideration of the premises recited in the foregoing three findings and of the covenants contained in the treaty itself to the performed by the United States, that the claimants cede and relinquish to the United States all their right, title, and interest in and to their Green Bay lands (excepting a small reservation), and in consideration of this cession and relinquishment the United States, in and by the treaty, agree and guarantee as follows:

First, to set apart as a permanent home for all of the claimants having no permanent homes a certain tract of country west of the Mississippi River, described by metes and bounds and to include 1,624,000 acres of land: to have and to hold the same in fee simple to the said tribes or nations of Indians by patent from the President of the United States, is conformity to the provisions of section 3 of the act of Congress of May 28, 1830, entitled "An act to provide for an exchange of lands with the Indians residing any of the States or Territories, and for their removal west of the Mississippi; the same to be divided among the different tribes, nations, or bands in severalty; it being understood that the said country was intended as a future home for the following tribes: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns, and was to be divided equally among them according to the number of individuals in each tribe, as set forth in a schedule annexed to

the treaty and designated as Schedule A, on condition that such of the claimants as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart. The following is the Schedule A:

*Census of the New York Indians as taken in 1837.*

Number residing on the Seneca reservations:

| | |
|---|---|
| Seneca | 2,309 |
| Onondagas | 194 |
| Cayugas | 130 |
| | 2,633 |
| Onondagas, at Onondaga | 300 |
| Tuscaroras | 273 |
| St. Regis in New York | 350 |
| Oneidas at Green Bay | 600 |
| Oneidas in New York | 620 |
| Stockbridges | 217 |
| Munsees | 132 |
| Brothertowns | 360 |



Second. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes, and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Third. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourth. The United States agreed to pay to the several tribes and nations of the claimants hereinafter mentioned, on their removal west, the following sums, respectively, namely: To the St. Regis tribe, $5,000; to the Seneca Nation, the income, annually, of $100,000 (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayuga, $2,500 cash and the annual income of $2,500; to the Onondagas, $2,000 cash and the annual income of $2,500; to the Oneidas, $6,000 cash and to the Tuscarora, $3,000.

Fifth. The United States agreed to appropriate the sum of $400,000, to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts. It does not appear that application was made by the tribes or lands or any of them to the Government for removal to the Kansas lands, except as appears in Finding XV below. Article 3 of this treaty of Buffalo Creek provides that such of the tribes of the New York Indians as did not accept and agree to remove to the country act apart for their new homes within five years, or such other time as the

President might appoint, should forfeit to the United States all interest in the lands so set apart. By supplemental article the St. Regis Indians assented to the treat with this stipulation, viz:

And it is further agreed that any of the St. Regis Indians who wish to do so shall be at liberty to remove to the "said country at any time hereafter within the time specified in this treaty, but the Government shall not compel them to remove."

The treaty of January 15, 1838, as amended by the Senate June 11, 1838, was assented to September 28, 1838, by the Seneca tribe of New York Indians; August 9, 1838, by chiefs of the Oneida tribe; August 14, 1838, by the Tuscarora Nation residing in New York; August 30, 1838, by Cayuga Indians residing in New York; October 9, 1838, by the St. Regis Indians residing in New York; August 31, 1838, by the Onondaga tribe of Indians on the Seneca reservations in the State of New York.

There is no evidence before the court that the Onondagas at Onondaga (300), Oneidas at Green Bay (600), Stockbridges (217), Munsees (132), Brothertowns (360), ever assented to the treaty as amended by the Senate June 11, 1838.

X.

In the year 1838, at the time of the making of the treaty of Buffalo Creek, the Six Nations of New York Indians, designated by that name in the treaty, consisted of six separate nations or tribes known and named as the Senecas, the Onondagas, the Oneidas, the Cayugas, the Tuscaroras, and the St. Regis; and each of said nations or tribes, except the Cayugas, owned and possessed a reservation of land in the State of New York on which the members of said tribes



resided and the right to occupancy to which was secured to them by treaty stipulations. The Cayuga Indians had no separate reservation of their own in the State of New York, but made their home with and resided upon the reservation and lands possessed by the Seneca Nation with the consent of the latter.

XI.

The lands occupied by the Seneca Nation in the State of New York, as set forth in the last preceding finding, consisted of four separate and distinct reservations, namely:

The Buffalo Creek Reservation in Erie County, containing 49,920 acres; the Cattarangua Creek Reservation, containing 21,660 acres; the Alleghany Reservation, containing 30,469 acres, and the Tonawanda Reservation, in Genesee county, containing 12,800 acres. The lands occupied by the Tuscaroar Indians were situated in Niagara County, N.Y. and comprised 6,249 acres. The lands occupied by the Onondaga tribe were situated in Onondaga County, N.Y., and comprised 7,300 acres. The lands so-occupied by the Oneida tribe were situated in Oneida and Madison counties, N.Y., and comprised 400 acres. The reservation and lands occupied by the St. Regis tribe, were situated in Franklin County, N.Y., and comprised about 14,000 acres.

XII.

For may years prior to the making of the treaty of Buffalo Creek, in 1838, the said several nations or tribes of Indians had improved and cultivated their lands, on which they resided and from the products of which they chiefly sustained themselves.

XIII.

At the time of the making of the treaty of Buffalo Creek in 1838, on Thomas L. Ogden and one Joseph Fellows, both residents of the State of New York, claimed to be the assignees of the State of Massachusetts and owners of the pre-emptive right of purchase from the Seneca Nation of the several reservations of land occupied by them as above set forth, which preemptive right had been secured to the Commonwealth of Massachusetts by a convention of the States of New York and Massachusetts, held on the 6th day of December, 1786. The claims of the said Ogden and Fellows were recognized and provided for in the said treaty of Buffalo Creek and the treaty supplementary thereto, which was entered into between the United States and the said Six Nations on the 20th day of May, 1842. After the ratification of said treaty of 1842, which was proclaimed on the 26th day of August in that year, the Seneca Nation surrendered to said Ogden and Fellows the possession of the Buffalo Creek Reservation aforesaid, and the said nation has since continued to occupy the Cattaraugus and Alleghany reservations mentioned in said treaties of 1838 and 1842.

XIV.

The President of the United States never prescribed any time for the removal of the claimants or any of them to the lands or any of them set apart by the treaty of Buffalo Creek.

XV.

No provision of any kind was ever made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo Creek, and of this number only 32 ever received patents or certificates of allotment of any of the lands mentioned in the first article of the treaty, and the account allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.



In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation and in conformity with such desire said Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

The sum of $9,464.06 of amount appropriated by Congress was expended in the removal of a party of New York Indians under his direction in 1846.

XVI.

The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefore.

XVII.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek were, afterwards, surveyed and made part of the public domain, and were sold or otherwise disposed of by the United States, which received the entire consideration therefore; and the said lands thereafter were and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of the said lands as were sold was at the rate of $1.34 per acre, while the cost of surveying, etc., by the same was at the rate of about 12 cents per acre, making the net price realized by the United States about $1.22 per acre.

XVIII.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of the release by the said band of its claims upon the United States to the lands west of the State of Missouri all right and claim to be removed thither and for support and assistance after removal and all other claims against the United States under the treaties of 1838 and 1842 (reserving their rights to moneys paid or payable by Ogden and Fellows), agreed to pay and invest, and did pay and invest, for said band the sum of $256,000. This amounted in substance to compensating the beneficiaries of the treaty of 1838 at the rate of $1 per acre for their claims to lands in Kansas, under said treaty, and also their proportionate share of the $400,000 provided to be appropriated in that treaty.

XIX.

After March 21, 1859, an order the Secretary of the Interior was made which directed that the tract of land in Kansas Territory known as the New York Indian Reserve should be surveyed with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. After this and before the proclamating of the President of said lands as part of the public domain (December 3 and 17, 1880) the New York Indians employed counsel to protect and presents their claims in the promises, asserting in the powers of attorney that the United States had seised upon the said lands contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof; the said Indians have steadily since asserted their said claims.

XX.

Of the sum of $400,000 agreed by the treaty of Buffalo Creek to be appropriated by the United States for the



purposes mentioned in the ninth finding above, only the sum of $20,477.50 was so appropriated (except as hereinafter stated). Of this sum only $9,464.06 was actually expended; this sum was expended for the removal, more than five years after the ratification of the treaty, of some of the 200 individuals mentioned in the fifteenth finding above; but in addition to said sum of $9,464.06 there was paid for the Tonawanda band of Seneca $256,000, as mentioned in the eighteenth finding above.

XXI.

The records of the Indian Office do now show that the President ever prescribed any time for the removal of the New York Indians to Wisconsin under the treaties of February 8, 1831, and October 27, 1832, or that the President prescribed any time for the removal of the New York Indians from Wisconsin and New York to the Kansas lands under the treaty of Buffalo Creek (January 15, 1838), or that the Government took any steps to defend those Indians who did remove to Kansas "in the peaceable possession of their new homes."

XII.

The account under the treaty of Buffalo Creek may thus be stated (omitting all questions of law and as to interest and without deciding that the United States are or are not responsible for any portion thereof):

Credit the tribe with ---

1,824,000 acres of land in Kansas, at

$1 per acre..... $1,824,000.00

Amount named in article 9 to 14, both inclusive, of the treaty of Buffalo Creek (except the $1,000,000 for the Seneca Nation, which has been taken into account is other dealing between the United States and that nation respecting the claims of Ogden and Fellows) ..... 23,000.00

Amount named in article 15 of the treaty ..... 400,000.00

..... 2,347,000.00

Balance 1,971,295.93

BY THE COURT.

Filed January 11, 1892.

A true copy.

Test, this 16th day of January, A.D. 1892.

[SEAL.] JOHN RANDOLPH,

*Assistant Clerk, Court of Claims.*

**S. Rlls. 2-------62**





**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF NEW YORK**

**The Oneida Indian Nation of New York,**

**Plaintiff,**

**v.** **Civil Action No. 74-CV-167**

**Abraham Williams, et al.,** **Affidavit of Leslie M. Gay**

**Defendants.**

---

Leslie M. Gay, being duly sworn according to law, deposes and states the following:

1. I am employed in the Bureau of Indian Affairs, United States Department of the Interior, at Chief of the Tribal Relations Branch of the Office of Indian Services.

2. In my position, I work with the recognition of Indian tribes, the organization of tribal governments and the revision or modification of tribal governing documents.

3. Oneida Indian Nation of New York and the Oneida Tribe of Wisconsin are federally recognized Indian tribes. The Oneida Indian Nation of New York is one of the Indian tribes which entered into and signed the Treaty of Fort Stanwix, dated October 22, 1784, 7 Stat. 15, the Treaty of Fort Stanwix, dated January 9, 1789, 7 Stat. 34, the Treaty with the Six stations, dated November 11, 1794, 7 Stat. 43.

The Oneida Tribe of Wisconsin is recognized by the Secretary of the Interior as a successor in interest to the signatories of those treaties.

4. The Bureau of Indian Affairs recognizes the Oneida Indian Nation of New York as the Indian tribe which remained on the New York Oneida Indian Reservation, as surveyed by Nathan Burchard, following the Treaty of May 23, 1842 between the State of New York and the First and Second Christian Parties of the Oneida Indians.

5. The Bureau of Indian Affairs recognizes the customs and usage of the Oneida Indian Nation of New York as to membership in the Nation and selection of tribal leaders.

6. At the time this action was filed, in April 1974, the Bureau of Indian Affairs recognized Jacob Thompson and the Executive Committee as the President and representatives of the Oneida Indian Nation of New York.

7. The Bureau of Indian Affairs recognizes the Oneida Tribes of Indians of Wisconsin as a distinct and separate entity from the Oneida Nation of New York. The Wisconsin Tribe operates under its new constitution adopted pursuant to the Indian Reorganization Act, Act of Jun 18, 1934. 48 Stat. 984, 25 U.S.C. 461. et seq.

_____

Affiant

City of Washington ) ss:
District of Columbia )

Sworn to and subscribed before me this __ day of March, 1976.



_____

Notary Public

**City Attorney Letter, City of Verona, February 18, 1993**

February 18, 1993

Assessors
Town of Verona
Germany Rd., RD #1, Box 249
Durhamville, New York 13054

Re: Town of Verona; Oneida Nation Land – Route 365 and Patrick Road

Gentlemen:

This letter is written relative to your request for an opinion as to the taxability/non-taxability of the Oneida Indian Nation land located on State Route 365 and Patrick Road – the same bearing, or so I have been advised, the following tax map numbers: 298.000-1-30.3, 298.000-1-38; 298.000-1-39.1, 298.000-1-27 and 298.000-1-15.2

As a result of my research, I am comfortable in offering the opinion that there is adequate support and justification for a determination that the premises are not taxable.

I base this opinion on the following:

1.The aforesaid premises constitute "reservation land" pursuant to the Treaty of 1794 (notwithstanding that the same have been occupied by non-Indians) and therefore are exempt pursuant to Section 454 of the Real Property Tax Law.

2.Federal Law (Non-Intercourse Act, 25 U.S.C. §177) bars any sale of Indian land as a result of taxes in that this Section prohibits all sales without federal approval. Accordingly, and assuming for the purpose of argument that the land was taxable, there would be no method to insure collection or compel payment.



In addition to the foregoing, there is also the practicable consideration of the very substantial cost and expense to the Town of Verona in attempting to obtain a favorable court ruling that the property is taxable inasmuch as I have been assured by an Attorney for the Nation that they would challenge efforts by any taxing authority to obtain such determination.

I trust that you will find the foregoing helpful, but if you should have any questions, please do not hesitate to contact me.

Very truly yours,

TIMOTHY A. SMITH, P.C.

By

Timothy A. Smith

TAS:odk

cc: Ron. Maurice Daeley, Supervisor
Mrs. Betty A. Holmes, Town Clerk

**Sherrill City Commission Meeting, September 22, 1997**

REGULAR MEETING

September 22, 1997

A regular meeting of the Sherrill City Commission was held at 7:00 p.m. on September 22, 1997. Present were Mayor D. Evans, Commissioners W. Glasgow, R. Quackenbush, B. Carroll, T. White, City Manager D. Barker, City Clerk M. Holmes and City Attorney D. McDermott.

MINUTES

Motion was made by W. Glasgow and seconded by T. White that the minutes of the previous regular meeting be approved as written.
AYES: Glasgow, Quackenbush, Carroll, White, Evans

BILLS

Motion was made by B. Carroll and seconded by T. White that the following bills be approved for payment:

City Claims on Warrant No. 18

dated 9/22/97 .....$52,758.50

Sewer Claims on Warrant No. 18

dated 9/22/97 .....8,194.64

P&L Claims on Warrant No. 23

dated 9/22/97 .....129,715.93

Trust & Agency Claims on Warrant



No. 18 dated 9/22/97 .....5,479.16

Capital Claims on Warrant No. 10

dated 9/22/97 .....8,406.04

AYES: Glasgow, Quackenbush, Carroll, White, Evens

SCOTT NILES -- LINEMAN

D. Barker reported that Scott Niles has been a lineman for 2+ years and has completed the required course work and experience to be considered as a lineman. Motion was made by W. Glasgow and seconded by R. Quackenbush that Scott Niles be moved to lineman's status step 1 effective immediately.

ONEIDA INDIAN NATION

D. McDermott was present and has 2 separate easements that would allow the Sherrill Power and Light to place a transformer on the Oneida Nation property at 245 West Seneca Street. Mr. McDermott reported that the easement is standard with the exception that it is renewable each year but if not renewed the City would remove the equipment at the Nation's expense. The other item that is not standard is that the Bureau of Indian Affairs (BIA) needs to ratify it. That is the reason for two easements. The first one contains all the necessary language including a clause that stated that if the BIA did not ratify the easement then the equipment would be removed by the City at the Nation's cost. The second easement is identical except it does not include that clause but it would contain the ratification stamp by the BIA. Motion was made by W. Glasgow and seconded by T. White to accept both easement so that one with the BIA clause would become void after the BIA ratifies the easement and that ratified easement would be the one filed with Oneida Country.

AYES: Glasgow, Carroll, White, Evans

ABSTAIN: Quackenbush

D. Barker reported that the Power and Light would begin working on the equipment installation as their schedule allowed and that the transformer was probably still a week or two away from arrival.

CITY AUCTION

M. Holmes presented the Commission with a list of surplus equipment and furniture that the City would like to get rid of. Motion was made by W. Glasgow and seconded by B. Carroll that an auction date be sent for October 25, 1997 at 10:00 a.m. at the Public Safety Building. Pre auction viewing would be from 9:00 a.m. – 10:00 a.m.

AYES: Glasgow, Quackenbush, Carroll, White, Evans

OPEN HOUSE

The City Commission set a date for an open house for residents to see the new City Hall and the rest of the building complex including the City Court and Public Safety Building. The Open House will be from 10:00 a.m. – 1:00 p.m. on Saturday, October 18, 1997.

EXECUTIVE SESSION

Motion was made by W. Glasgow and seconded by R. Quackenbush to go into executive session to discuss personal matters regarding the Police Chief.

AYES: Glasgow, Quackenbush, Carroll, White, Evans



Motion was made by W. Glasgow and seconded by T. White to reconvene the regular meeting.

AYES: Glasgow, Quackenbush, Carroll, White, Evans

Motion was made by W. Glasgow and seconded by T. White to adjourn.

AYES: Glasgow, Quackenbush, Carroll, White, Evans

Michael Holmes
City Clerk

**Oneida Indian Nation Silver Covenant Chain Grants for Local Governments Fact Sheet, October 28, 1997**

**Oneida Indian Nation**
**Silver Covenant Chain Grants for Local Governments**
**Fact Sheet**

1. Effective January 1, 1998, the Nation intends to expand its Silver Covenant Chain Grant Program to include Municipalities and Countries affected by its land repossession policy.

2. Under this Program expansion, the Nation will provide direct grant monies to Municipalities and Countries based on the cumulative reservation land which the Nation has repossessed since 1987. Payments will be made quarterly, commencing on January 1, April 1, July1 and October 1 of each year.

3. Each Municipality and County within the Nation's reservation boundaries, as defined by the 1794 Treaty of Canandaigua, will qualify for these quarterly grant payments once the following criteria are met.

   (A) The Municipality or County maintains a government to government relationship with the Oneida Nation that holds fast to and keeps bright the covenant chain of friendship, peace and goodwill;

   (B) The tax assessor(s)for the Municipality affected has: (1) eliminated the County's payment obligations for all Nation repossessed land by removing such land from the tax rolls of the Municipality, pending final resolution of the Nation's land claims; and (2) communicated these actions to the Nation in writing.



4. Each quarterly grant payment will be based on the cumulative amount of reservation land which the Nation has repossessed since 1987, as of the first day of the applicable quarter. On the first day of each quarter, the assessed value for each property possessed by the Nation will be totaled using the values on the date of acquisition by the Nation. This amount will be multiplied by 1.25 percent and then divided by four to determine the quarterly grant amount to be paid to each qualifying Municipality or County. Payments will be made within 30 days after the beginning of each quarter.

5. Starting in calendar year 1999, the quarterly grant amount to each Municipality or County will be increased by the amount calculated to be the percentage increase in the Consumer Price Index for Central New York as published by the United States Department of Labor, Bureau of Labor Statistics, for the previous calendar year. The percentage increase will be applied to the quarterly grant amount for each Municipality or County based on the land which the Nation possesses as of December 31 of the previous year. The inflation adjustment will be added to each quarterly payment thereafter, beginning with the second quarter payment.

6. Silver Covenant Chain payments to School Districts within the Nation's reservation shall continue under the same term as presently exist.

October 28, 1997

**ROME DAILY SENTINEL**

**DATE: 8-3-00**

**Page: 4**

***Oneida Nation sends more aid to school districts***

VERONA – Vernon-Verona-Sherrill School District received over $112,000 in aid from the Oneida Indian Nation's Silver Covenant Education grant program Tuesday, the highest among seven districts.

The program, which is in its firth year, is designed to help local school districts where the Oneida Nation has acquired ancestral lands.

Since 1996, Vernon-Verona-Sherrill School District has received a total $1,236,564.08 in grant funds.

Grants for the third quarter totaled more than $205,000.

Mark Emery, Nation media relations manager, said the quarterly grants, "are based on the cumulative average of reservation land that the Oneida Indian Nation has reacquired in each school district as of the first day of the applicable quarter, and payments are made within 30 days after the beginning of each quarter."

Eligible districts with third quarter payments are Vernon-Verona-Sherrill, $112,939.91;Canastota Central School, $29,811.76; Cazenovia Central Schools, $403.03; Madison Central Schools, $2,608.15; Morrisville-Eaton, $651,42; Oneida City Schools, $26,938.58; and Stockbridge Valley Central Schools, $29,803.64.



An annualized flat rate of 3.15 percent is applied to the land value, then divided by four to determine the quarterly payment.

"This formula doubles, and in some cases nearly triplets, the property taxes that would have been due on lands under private ownership," Emery said. "Each school district uses the voluntary grant at its own discretion."

Grant money is used by most districts to help fund academic programs, provide instructional materials and supplies and also helps to pay teachers' salaries and lower taxes.

The Oneida Indian Nation has awarded more than $1.8 million to area school districts since the Silver Covenant program's creation in 1996.

Cumulative grants for the other school districts since 1996 are as follows:

Canastota: $221,513.52

Cazenovia: $3,689.24

Madison: $12,826.70 (added in 1999)

Morrisville-Eaton: $1,936.44 (added in 2000)

Oneida: $209,284.85

Stockbridge-Valley: $164,389.29.

**City of Sherrill Tax Sake Deed, February 9, 2000**

**A. SANDRA CARUSO**
**ONEIDA COUNTY CLERK**
**RECORDING CERTIFICATE**

TRANSACTION NUMBER 3382

Tax Sale Deed

TYPE OF INSTRUMENT

Michael D. Holmes, Clerk

FIRST PARTY

The City of Sherrill, New York

SECOND PARTY

RECEIVED FROM

27 4

RECORDING CHARGE RECORDING PAGES

**EXAMINED AND CHARGED AS FOLLOWS**

TRANSFER FAX 0.00 MTG./DEED AMOUNT

RS# 4268 MORTGAGE #

TOWN Vernon RECEIVED TAX ON ABOVE MORTGAGE



BASIC

SPECIAL ADDL

MORTGAGE TAX TOTAL

TOTAL RECORDING FEES 57

**THIS PAGE IS PART OF THE INSTRUMENT**

I HEREBY CERTIFY THAT THE WITHIN AND FOREGOING WAS RECORDED IN THE CLERK'S OFFICE OF ONEIDA COUNTY, NEW YORK.

TERMINATION ID 2

INITIALS 3

THIS SHEET CONSTITUTES THE CLERK'S ENDORSEMENT, REQUIRED BY SECTION 116, OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH. THIS PAGE IS PART OF THE RECORDED INSTRUMENT.

RETURN TO: (NAME) Dennis E. McDermott, Esq.

(ADDRESS) 112 Ferrier Avenue

Oneida, NY 13421

TAX SALE DEED

Made this 9th day of February, 2000 by and between:

MICHAEL D. HOLMES, as City Clerk of the City of Sherrill, Oneida County, New York.

the "Grantor," and

THE CITY OF SHERRILL, NEW YORK, a municipal corporation having its

office and principal place of business at 377 Sherrill Road, Sherrill, New York.

The "Grantee."

*WITNESSETH,* that the Grantor, under the authority contained in Title VII of the Sherrill City Charter (Local Law No. 1 of the Year 1925, as amended) and in Section 1060 of the Real Property Tax Law of the State of New York, does hereby remise, release and quitclaim unto the Grantee, its successors and assigns, forever the following premises for unpaid taxes for the year 1997:

*FIRST PARCEL:*

Premises of Oneida Indian Nation of New York

West Seneca Street, Sherrill, New York

City of Sherrill/Town of Vernon/Oneida County/New York

SBL No. 322.014-1-23 100 ft. front x 200 ft. depth



1997 Tax $2,083.00

*SECOND PARCEL:*

Premises of Oneida Indian Nation of New York

Prospect Street, Sherrill, New York

City of Sherrill/Town of Vernon/Oneida County/New York

SBL No. 322.014-1-25 55 ft. front x 211.60 ft. depth

1997 Tax $21.00

*THIRD PARCEL:*

Premises of Oneida Indian Nation of New York

Prospect Street, Sherrill, New York

City of Sherrill/Town of Vernon/Oneida County/New York

SBL No. 322.014-1-26 60 ft. front x 211.60 ft. depth

1997 Tax $21.00

Subject only as to such claims thereon as by law are provided.

*IN WITNESS WHEREOF,* the Grantor has executed this instrument on the date first above written.

[S E A L]

Michael D. Holmes
Sherrill City Clerk

STATE OF NEW YORK

COUNTY OF ONEIDA ss:

On this 9th day of February, 2000, before me, the subscriber, personally appeared MICHAEL D. HOLMES, to me known or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(-ies) and that by his/her/their signature(s) on the instrument, the individual(s), or the person(s) on whose behalf such individual(s) acted, executed the instrument.

Notary Public

PAM E. VOELKER
Notary Public in the State of New York
Appointed in Oneida County
Reg. No. 01V04810324
My Commission Expires Oct. 31, 00



TAX SALE AFFIDAVIT
WEST SENECA STREET and PROSPECT STREET

SHERRILL, NEW YORK

STATE OF NEW YORK

COUNTY OF ONEIDA ss:

MICHAEL D. HOLMES, being duly sworn, deposes and says:

1. At all times herein mentioned, I was and still am the City Clerk of the City of Sherrill, New York.

2. On August 7, 1997, letters to all delinquent taxpayers, including the Oneida Indian Nation of New York, were mailed. Such notice to the Oneida Indian Nation of New York was enclosed in a postpaid envelope address as follows:

Oneida Indian Nation of New York
c/o Ray Halbritter
Box 1
Vernon, NY 13476

and was deposited in the United States Post Office at Sherrill, New York. Such notice demanded payment of such delinquent taxes by September 2, 1997.

3. At a regular meeting of the City Commission held on September 8, 1997, at which a quorum was present throughout, a resolution was duly adopted directing me to advertise and sell the subject premises.

4. A tax sale notice was duly published in the Oneida Daily Dispatch, the official newspaper of the city, once a week for six (6) consecutive weeks on September 17, September 24, October 1, October 8, October 15, October 22 and October 29, 1997. There was further posted a notice of said sale not less than 42 days prior to the date of sale in the following three (3) public places within the City of Sherrill.

1. Sherrill City Hall;

2. Sherrill Police Station; and

3. Sherrill Post Office.

5. A tax certificate sale was held at the Sherrill City Hall, 377 Sherrill Road in said city, on November 5, 1997 at 2:00 PM. The city was the sold bidder and bid the subject premises in for the respective sums as follows:

| | |
|---|---|
| SBL No. 322.014-1-23 (West Seneca Street) | $2,291.31 |
| SBL NO. 322-014-1-25 (Prospect Street) | 23.13 |
| SBL No. 322.014-1-26 (Prospect Street) | 23.13 |
| Total | $2,337.57 |

The tax sale certificate for the subject premises was recorded in the office of the Oneida County Clerk on December 10, 1997.

6. Notice of redemption was published in the Oneida Daily Dispatch on November 8, 1999, December 8, 1999 and January 7, 20000, stating that the last day to redeem the property was February 8, 2000. A true copy of such notice was personally served on William Hervey, the Director of Intergovernmental Relations for the Oneida Indian Nation of New York (the said Oneida Indian Nation of



New York being the record owner of said property) on January 10, 2000 at about 11:30 AM at the office of the Oneida Indian Nation, 579A Main Street, Oneida, New York. With respect to SBL No. 322.014-1-23 (West Seneca Street), an additional true copy of such notice was also personally served on Kathy Perham, the Executive Assistant to the General Manager of the Oneida Textile Designs (reputedly, an enterprise of the said Oneida Indian Nation of New York conducting its business from the said premises) at approximately 12:00 PM on January 10, 2000 on the said premises. An additional true copy of such notice was posted on each of the following parcels which were, at that time, vacant:

SBL No. 322.014-1-25 (Prospect Street)

SBL No. 322.014-1-26 (Prospect Street)

Such posting occurring at approximately 12:00 PM on January 10, 2000.

7. As of the date of this affidavit, none of the aforementioned parcels has been redeemed.

8. To the best of my knowledge, all requirements for the sale of the property for unpaid delinquent property taxes as set forth in Title VIII of the Sherrill City Charter have been complied with.

_____

Michael D. Holmes
Sherrill City Clerk

Sworn to before me this
9th day of February, 2000.

Notary Public
PAM E. VOELKER
Notary Public in the State of New York
Appointed in Oneida County
Reg. No. 01V04810324
My Commission Expires Oct. 31, 00



**Letter from Michael Anderson, Acting Assistant Secretary, Indian Affairs, January 19, 2001**

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

January 19, 2001

The Honorable Dwight L. Evans
Mayor, City of Sherrill
New Sherrill Town Building
377 Sherrill Road
Sherrill, New York 13461

Re: City of Sherrill vs. Oneida Indian Nation

Dear Mr. Evans:

I understand that in certain pleadings filed in the above-captioned case, lawyers for the City of Sherrill and others contend that the Department of the Interior does not recognize an Oneida reservation created by the Treaty of Canandaigua. Your counsel has referred to certain maps and census reports as evidence of either non-recognition or diminution of that reservation.

Any attempt to utilize Bureau of Indian Affairs records to support the notion that the Oneida reservation was disestablished would be erroneous. The Office of the Assistant Secretary Indian Affairs supports the view that the

Treaty of Canandaigua created a reservation with approximately 250,000 acres in Central New York, that the lands which are the subject of the pending claim are within that area and the claim area has never been disestablished or diminished. Please be advised that the Deputy Commissioner of Indian Affairs concurs in this conclusion.

Sincerely

Michael Anderson
Acting Assistant Secretary – Indian Affairs

cc: Sharon Blackwell, Deputy Commissioner of Indian Affairs
Raymond Halbritter, Oneida Nation Representation





**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**
**Eastern Regional Office**
**Suite 260**
**3701 North Fairfax Drive**
**Arlington, Virginia 22203**

December 26, 2000

Mr. Ray Halbritter, Nation Representation
Oneida Indian Nation
c/o Turning Stone Casino Resort
P.O. Box 126, RD #2 Patrick Road
via Verona, New York 13478

**Re: $70,644,384.00 Combined Credit Facility and Bond Offering with KeyBank National Association, for itself and certain other Lenders**

Dear Mr. Halbritter:

In connection with your request for review of the documents shown on the attached Document List for compliance with 25 U.S.C. §81 (as amended in Public Law 106-179, March 14, 2000), we have review the documents and have determined that the only documents that "encumber Indian lands for a period of 7 or more years" (P.L. 106-179 §2103(b) are the (i) Consolidated Leasehold Indemnity Mortgage and Security Agreement and the (ii) Assignment of Rents and Leases. The other documents shown on the attached list do not require approval under Section 81. Based

upon our review, the Leasehold Mortgage and the Assignment are in compliance with the applicable section of the Code and are hereby approved. We have enclosed executed copies of individual Section 81 Approvals that can be attached to each approved document.

In connection with our Section 81 review, we have also reviewed Phase 1 Environmental Study and your Supplemental Environmental Assessment each dated December 2000. We have reviewed these items to ensure that our approval is in compliance with the National Environmental Policy Act ("NEPA"). The two uses for the private financing approved under Section 81 are (i) an expansion of the existing casino facility and (ii) construction of a clubhouse for the existing golf course. We have determined that the gaming expansion is within the scope of activities analyzed in the original Environmental Assessment. We have also determined that the golf course clubhouse, based upon the submitted Supplemental Environmental Assessment, will have no significant impact on the environment. We have enclosed a Notice of Finding of No Significant Impact. We have also determined that you are not required to post or publish the FONSI and the approval under Section 81 shall be effective as indicated therein.

Sincerely,

Franklin Keel
Eastern Region Director



**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**
**Eastern Regional Office**
**Suite 260**
**3701 North Fairfax Drive**
**Arlington, Virginia 22203**

SECTION 81 APPROVAL

The Oneida Indian Nation, a sovereign Indian nation (the "Nation"), has submitted this Consolidated Leasehold Indemnity Mortgage and Security Agreement from the Oneida Land Corporation dated as of December 1, 2000 (the **"Leasehold Mortgage"**), from the Oneida Land Corporation to Keybank National Association, in its individual capacity and as Agent for certain Lenders described therein, to the Department of Interior, Bureau of Indian Affairs (the **"Department"**), for its review and has requested its approval pursuant to 25 U.S.C. Section 81 (as amended in Public Law 106-179, March 14, 2000). The Department has reviewed this Leasehold Mortgage and determined that it complies with the provisions of 25 U.S.C. Section 81 (as amended in Public Law 106-179, March 14, 2000).

This Leasehold Mortgage is hereby approved by the Secretary of the Interior or his designee pursuant to 25 U.S.C. Section 81 (as amended in Public Law 106-179, March 14, 2000).

This Approval relates back to the aforesaid date of the Leasehold Mortgage.

**Approved Pursuant to 25 U.S.C. 81:**

United States Department of Interior Bureau of Indian Affairs

Dated: DEC 26 2001

Franklin Keel, Director of the Eastern Regional Office of the Bureau of Indian Affairs for the Secretary of the Interior acting under delegated authority.



**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**
**Eastern Regional Office**
**Suite 260**
**3701 North Fairfax Drive**
**Arlington, Virginia 22203**

## SECTION 81 APPROVAL

The Oneida Indian Nation, a sovereign Indian nation (the "Nation") has submitted this Assignment of Rents and Leases from the Oneida Land Corporation dated as of December 1, 2000 (the **"Assignment"**), from the Oneida Land Corporation to Keybank National Association, in its individual capacity and as Agent for certain Lenders described therein, to the Department of Interior, Bureau of Indian Affairs (the **"Department"**), for its review and has requested its approval pursuant to 25 U.S.C. Section 81 (as amended in Public Law 106-179, March 14, 2000). The Department has reviewed this Assignment and determined that it complies with the provisions of 25 U.S.C. Section 81 (as amended in Public Law 106-179, March 14, 2000).

This Assignment is hereby approved by the Secretary of the Interior or his designee pursuant to 25 U.S.C. Section 81 (as amended in Public Law 106-179, March 14, 2000).

This Approval relates back to the aforesaid date of the Assignment.

**Approved Pursuant to 25 U.S.C. 81:**

United States Department of Interior
Bureau of Indian Affairs

Dated: DEC 26 2001

Franklin Keel, Director of the Eastern Regional Office of the Bureau of Indian Affairs for the Secretary of the Interior acting under delegated authority



**Zogby Study, Oneida Indian Nation Economic Impact Study 2000**

ONEIDA INDIAN NATION
ECONOMIC IMPACT STUDY 2000
Submitted to:
Diane Sterling

Submitted by:
Zogby International
John Zogby, President
John Bruce, Vice President Systems Administration
Rebecca Williams, Vice President Editorial

John Karin,
Stephen P. Neun, Ph.D.,
David H. Beatty, Ph.D.,
Analysts/Writers

November 13, 2000
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Appendix A: Jobs generated in the three-county area via the multiplier.

[2]

## I. Executive Summary

- The Oneida Nation Enterprises directly employs 2,8547 workers. When the impact of capital outlays for the 2000 fiscal year are taken into consideration, 3,041 jobs are directly related to the economic endeavors of the Oneida Nation Enterprises. *(All references to the fiscal year refer to data collected from Nov. 1 to Oct. 30.)*

- Job growth at the Nation has tapered off in recent years, but overall employment has held steady at between 2,850 and 3,000 workers since 1997.

- When indirect job creation from current operations is taken into account, 4,049 jobs have been created in Oneida, Madison, and Onondaga counties, and 4,193 have been generated statewide.



- Capital outlays for plant expansion and equipment in 2000 equaled $25.6 million, and that is down considerably from $70.5 million in 1999. Despite this decrease, capital outlays generated 393 jobs through direct and indirect effects in the three-county region.

- Total wages at the Oneida Nation Enterprises equaled $63.3 million in 2000 and reflect a steady upward trend.

- Indirect job creation in the three-county region added 1,401 jobs, of which 1,192 were generated from current employment at the Nation. The remaining 209 jobs reflect the indirect impacts of capital outlays. As a result, the Oneida Nation Enterprises in the three-county region created a total of 4,442 jobs in 2000.

- Non-Native Indian employees at the Oneida Nation Enterprises continue to generate substantial tax revenues for all levels of government.

- Those employees paid an estimated $15.5 million to New York State and $17 million in federal payroll taxes in 2000, and that includes federal income taxes along with the employee and employer portions of the Social Security and Medicare taxes.

- Vendor spending by the Oneida Nation equaled nearly $123.3 million in 2000, which is up substantially from the previous year.

- Vendor spending impacts a multitude of sectors throughout the three-county area, as well as in New York State. More than 4,000 vendors provided goods and services to the Oneida Nation Enterprises in 2000.

- Vendor spending in the three-county area has created approximately 200 jobs.

- The Oneida Indian Nation, through its job creation and various enterprises both within the Nation and in the surrounding communities, continues to generate revenues for the many governmental agencies contiguous to the Nation. These revenues include personnel, sales and real property taxes generated by Nation employees, and Nation vendor spending.

[3]

- More than 90% of the Nation employees reside in the three-county area, which means that a high proportion of the payroll impacts is felt in the immediate geographic region.

- Approximately 3.5 million guests visited Turning Stone in 1999, down slightly from projected figures, but an increase over the 3.4 million the previous year. In 2000, there was a moderate reduction in attendance to 3.5 million. Based on tracking data, the casino is anticipating attendance figures to reach 3.8 million in 2001.

- Building permits in Oneida and Madison counties in 2000 continued the steady upward trend which was demonstrated in 1998 and 1999. Contractors and realtors have cited the Oneida Nation and the capital building program on the Nation's property as a significant reason for construction growth.

- Home improvement contracting in the three-county area – additions and general home improvements – is as strong in 2000 as in 1998-1999.

[4]

## II. Conclusions and Recommendations

The Oneida Indian Nation should keep two words in mind, stability and diversity, as it plans its development into the new century.

In the past decade, the Nation has demonstrated its commitment to the region in terms of hiring workers, expanding activities and attracting thousands of tourists annually.

Job growth has been stable over the years, and it appears to have reached a plateau at about 3,000 employees. Local municipalities should recognize that the Nation's workforce is not only stable, but in contrast to other corporations, it cannot relocate, transfer jobs elsewhere or close its local operations at any point.

Stable jobs produce steady salaries, which as illustrated in this study, have a major impact on the area's economy. While the nation's hiring levels might remain static, it is important that it continue to attract a quality workforce thanks to its competitive salaries.

There can be efforts to expand diversification without substantially affecting the overall number of employees. For example, in the hotel-casino group, fewer than half of the employees are directly employed in casino operations. It was 45% in 2000, down from 55% in 1999. An increasing number of employees work in the showroom, the convention center, banquet operations, at the golf courses, and at the marina.

Continued diversification is recommended, both to counter competition from other casinos that concentrate narrowly on gaming, and to attract a wider range of guests for other activities at the Nation.

Diversification in the Nation's retailing and manufacturing operations also helps make the Nation's economic base more recession-proof. While any single type of recreational/tourism activity may face fluctuating demand from good times to bad, this diversification serves to augment stability.

The Nation should expand its efforts to inform the public about the history and culture of the region, creating added links that prompt visitors to return to the resort and Central New York. Because of the public's interest in the phenomenon of the Oneida Indian Nation, more emphasis on the Native American culture can reinforce ties between the Nation's own people, visitors and the region's residents.

Continued research to identify customer preferences in all of the Nation's activities is advisable. It helps to know whether the public is satisfied with existing enterprises and what types of diversification it would welcome in the future.

[5]

III. Narrative Analysis



PART I
JOB CREATION

Direct Job Creation

In 2000, the Oneida Nation Enterprises directly employed 2,857 individuals. Of that total, 92% were full-time positions, and 86% were held by non-Native Americans.

Table 1-1. Job Creation at the Oneida Nation Enterprises, 1990-2000*

| Year | Total Employment | Change From Previous Year |
|---|---|---|
| 1990 | 6 | -- |
| 1991 | 30 | 24 |
| 1992 | 74 | 44 |
| 1993 | 1,704 | 1,630 |
| 1994 | 2,006 | 302 |
| 1995 | 2,221 | 215 |
| 1996 | 2,417 | 196 |
| 1997 | 2,850 | 433 |
| 1998 | 2,991 | 141 |
| 1999 | 2,982 | -9 |
| 2000 | 2,857 | -125 |

*Source: Unless otherwise indicated, the Oneida Indian Nation is the source of the data shown in all tables.

While the number of jobs is down slightly from 2,982 in 1999, a look at Table 1 indicates that job growth at the Oneida Nation Enterprises has been nothing short of phenomenal throughout the 1990s.

From a modest beginning of only six employees, the Oneida Nation Enterprises has expanded to 2,857. Most of that growth took place in 1993 when the casino first opened its doors.

Over the past four years, employment growth has stabilized, and usually hovers between 2,850 and 3,000 jobs.

[6]

Table 1-2. Distribution of Employment in 2000

| Major Activity | Employment | % |
|---|---|---|
| Casino & Hotel Group | 2,176 | 76 |
| Administrative & Human Services | 362 | 13 |
| Retail Group | 267 | 9 |
| Textile Manufacturing | 52 | 2 |
| TOTAL | 2,857 | 100 |

Table 1-2 sheds some light on the overall distribution of jobs at the Oneida Nation Enterprises. At the present time, 76% of the workers employed by the Oneida Nation are directly connected with the Casino and Hotel Group. The other 24% are divided among the retail group, administrative and human services, and textile manufacturing.

Of the 2,176 employees working for the casino/hotel group, 46% operate games (down 10% from 1999); 20% are employed in food and beverages, and 8% are employed in hotel operations. The remaining one-quarter of the employees is involved in such operations as security, marketing/credit, and the golf course.

Indirect Job Creation

*Significance of the Multiplier*

As stated in the previous report, new business activity not only benefits the new jobholders, but has an impact on the local economy as well. Clearly, any additional jobs beget more jobs, as payroll from the initial jobs is spent and circulated throughout the local economy. And as business activity expands, the increase in purchases from suppliers generates even more employment.

The process just described is referred to as the multiplier effect and it measures the ability of one job to produce more jobs as income is circulated throughout the economy. Thus, an increase in employment in a given locality will cause a chain reaction that cumulates into a

multiplicative change in overall employment. It stands to reason that the multiplier effect is most strongly felt locally. The statewide effect is more magnified and includes the local effect, while the nationwide effect is even larger.

(For this report, Zogby International purchased a set of multiplier that covers the economic activities of the Oneida Nation Enterprises within Oneida, Madison and Onondaga counties, plus the state. The estimates were supplied by IMPLAN of Stillwater, Minnesota, a firm that specializes in input/out analysis and is among the most highly recognized sources.)

The multiplier effect can be observed every day. For example, take the case of an individual who recently found employment at a local manufacturing plant that is

[7]

expanding production. Upon receiving his first paycheck, he takes his car to the local auto repair shop to install a new muffler.

The owner of the auto repair shop, along with the shop employees, all benefit from these expenditures in terms of enhanced income. These individuals in turn, are likely to spend a portion of this additional income at the local supermarket or barbershop. Therefore, the total impact on the local economy in terms of jobs and income generated is far greater than the initial job created at the local manufacturing plant.

Economists generally estimate the multiplier based upon input/output analysis pioneered by Wassily Leontief. Input/out analysis is an important estimating tool employed by economists to tract the intricate web of production linkages among various sectors of the economy. From this



analysis, economists can derive a multiplier and, as one would expect, it varies widely across industries.

The multiplier effects are made up of two components: the payroll effect and the vendor spending effect. In the case of the multipliers applied to the Oneida Nation Enterprises, approximately 82% of indirect job creation emanates from payroll rollover, while the remaining 18% comes from the Nation's vendor spending.

Table 1-3. Job Creation Through the Multiplier Impacts

| Activity | Direct Job Creation | Three County | | Statewide | |
|---|---|---|---|---|---|
| | | Multiplier | Total Job Impact | Multiplier | Total Job Impact |
| Casino/ Hotel Group | 2,176 | 1.41 | 3,077 | 1.46 | 3,173 |
| Administrative/ Human Services | 362 | 1.38 | 501 | 1.45 | 525 |
| Retail Group | 267 | 1.41 | 375 | 1.45 | 387 |
| Manufacturing | 52 | 1.84 | 96 | 2.07 | 108 |
| TOTAL | 2,857 | 1.41* | 4,049 | 1.46* | 4,193 |

**The composite multipliers are based on a weighted average of the multipliers for the four major activities. Source: IMPLAN*

[8]

The actual multipliers for the three-county region and the state are supplied in Table 1-3. The composite multiplier for the three-county area (Oneida, Onondaga and Madison

counties) equals 1.41. This means that for every one job directly created by the Oneida Nation Enterprises, .41 jobs are created indirectly in the three-county area because of the increased need for inputs and the payroll effects that result from increased household income.

Overall, that translates into an additional 1,192 indirect jobs in the three-county area, with most of those jobs existing because of the casino and hotel group (901 jobs added).

On a statewide basis, the composite multiplier equals 1.46, and a total of 1,336 indirect jobs exist because of the Oneida Nation Enterprises. The casino and hotel group created 997 indirect jobs.

Table 1-4. Job Creation Impacts of Capital Expenditures in 2000

| Capital Expenditures in New York State (in millions of dollars) | | Direct Job Creation | Three-County Area | | Statewide | |
|---|---|---|---|---|---|---|
| | | | Multiplier | Total Impact | Multiplier | Total Impact |
| Construction | $16.8 | 147 | 2.2 | 323 | 2.4 | 350 |
| Equipment | 3.8 | 37 | 1.9 | 70 | 2.0 | 74 |

*Source: IMPLAN*

Outlays for land, new construction, and equipment also generate jobs that must be taken into consideration. For the 2000 fiscal year, the Oneida Nation Enterprises expended $25.6 million for land, new construction and equipment.



Assuming 80% of that outlay occurred within the three-county area, it was estimated that capital outlays directly generated 184 jobs for the three-county area during 2000. Of this total, 147 resulted from new construction and 37 from equipment outlays. Thus, total employment from capital outlays, including direct and indirect employment, each 393 jobs for the three-county area in 2000.

The statewide employment impacts are very similar. The Oneida Nation Enterprises generated a total of 424 jobs statewide because of capital expenditures during the 2000 fiscal year. Of that total, 240 were created indirectly.

[9]

Table 1-5. Comparison of Annual Employment Growth, 1991-2000

| Year | Oneida Nation | Three-County | Statewide |
|---|---|---|---|
| 1991 | 400 | -3 | -3 |
| 1992 | 147 | -1 | -2 |
| 1993 | 2,203 | 1 | 0.8 |
| 1994 | 18 | -0.3 | 0.5 |
| 1995 | 11 | -1 | -0.5 |
| 1996 | 9 | -0.1 | 1 |
| 1997 | 18 | 1 | 3 |
| 1998 | 5 | 0.1 | 1 |
| 1999 | -0.3 | -0.2 | 0.5 |
| 2000 | -4 | 2 | 2 |
| 1990-2000 avg. | 279 | 0.4 | 0.3 |
| 1993-2000 avg. | 8 | 0.3 | 1 |

The information contained in Table 1-5 compares job growth at the Oneida Nation Enterprises with employment trends at the regional and state levels. These figures clearly indicate that the annual rate of job growth at the Oneida Nation far outpaced that of the surrounding region and the state.

From 1993, when the Oneida Nation had its largest increase in employment, to the present, employment increased at the brisk pace of 8% per year. Over the same period, employment at the three-county and state levels increased only 0.3% and 1% per year, respectively.

To put these figures in perspective, the rate of job growth at the Oneida Nation Enterprises from 1993 through 2000 was over 25 times the rate of job growth for the three-county area, and over eight times the rate for employment growth for the entire state over the same period of time.



PART II
Vendor Spending

Table 2-1. Vendor Spending, 1998-2000

| Year | Spending (in millions) |
|---|---|
| 1998 | $102.6 |
| 1999 | 89.5 |
| 2000 | 123.3 |

Vendor payments by the Oneida Nation have played an important role in the economic vitality of the region. In



2000, vendor spending topped $123 million, and more than 47% of vendors were located in New York State.

Table 2-2. Vendor Count For Payments For Inputs and Capital Spending

| | Location of Vendors | | |
|---|---|---|---|
| Year | All Regions | Statewide* | Three-County |
| 1999 | 4,157 | 836 | 1,076 |
| 2000 | 4,003 | 829 | 1,055 |

(*excluding three-county region)

Here is an abbreviated list of goods and services purchased by Oneida Indian vendors: petroleum, cigarettes, t-shirts, bingo paper, retail gifts, vehicles, computers, daycare supplies, dice/cards, medical supplies, recreational supplies, salon supplies, food/beverages, dishes/glasses, consulting services, travel services, janitorial services, repairs/maintenance, landscape services and construction supplies.

Indirect Job Impacts

Job creation through vendor spending is one of the primary ways economic activity at the Oneida Nation Enterprises enhances the regional and state economy. In total, slightly less than 18% of the jobs generated from the multiplier impact result from vendor payments in the three-county region. The remaining 82% results from the rollover impact of payroll expenses.

A total of 203 jobs have been indirectly created via vendor payments in the three-county region. Table 2-3 provides a detailed breakdown of the top 39 sectors of the economy most likely impacted along with an estimate of the number of jobs created. For example, 32 jobs were created in

the personnel supply services sector in the three-county region in 2000.

[11]

Table 2-3. Indirect Jobs Created (Estimated) Through Vendor Spending in the Three-County Region

| Economic Activity | Jobs |
|---|---|
| Personnel Supply Services | 32 |
| Maintenance/Repairs-Other Facilities | 13 |
| Real Estate | 12 |
| Other Business Services | 11 |
| Wholesale Trade | 10 |
| Services to Buildings | 9 |
| Accounting, Auditing, Bookkeeping | 8 |
| Theatrical Producers, Bands, etc. | 6 |
| Research, Development/ Testing Services | 5 |
| Motor Freight Transport/Warehousing | 5 |
| Job Training and Related Services | 5 |
| Detective/Protective Services | 4 |
| Computer/Data Processing Services | 4 |
| Laundry/Cleaning/Shoe Repair | 4 |
| Newspapers | 4 |
| Management/Consulting Services | 4 |
| Legal Services | 4 |
| Advertising | 4 |
| Radio/TV Broadcasting | 4 |
| Hotels/Lodging | 4 |
| Landscape/Horticultural Services | 3 |
| Banking | 3 |
| U.S. Postal Service | 3 |
| Eating/Drinking | 3 |
| Retail Trade | 3 |
| Commercial Printing | 3 |
| Photofinishing/Commercial Photography | 3 |
| Communications, Except Radio/TV | 2 |
| Automobile Repair Services | 2 |
| Commercial Sports, Except Racing | 2 |
| Equipment Rental/Leasing | 2 |
| Miscellaneous Repair Shops | 2 |
| Electric Services | 2 |
| Engineering/Architectural Services | 1 |
| Miscellaneous Printing | 1 |
| Automotive/Apparel Trimmings | 1 |
| Credit Agencies | 1 |
| Maintenance/Repair-Residential | 1 |
| Motion Pictures | 1 |
| Air Transportation | 1 |

[12]

PART III

Tax Revenue and Tax Rates

As a federally recognized sovereign nation, the Oneida Nation claims exemption from the collection of state and county sales taxes, hotel occupancy taxes, and from property taxes on the land it owns.

Various court decisions, including United States District Court (1977), United States Circuit Court of Appeals (1983), and The Supreme Court (1985) have determined and affirmed that certain counties are responsible for settling the land claim issues with the Oneida Nation. Negotiations with New York State, and Oneida County and Madison County officials are ongoing.

Despite these exemptions, the Oneida Nation Enterprises generate significant revenues for all levels of

government. Most of these revenues result from taxes levied on non-Native American employees.

In 2000, Madison, Oneida, and Onondaga counties received approximately $264,849, $1.9 million and $324,813 respectively, in tax revenues due to employment at the Oneida Nation Enterprises. In addition, the three counties will share $1.7 million in revenues resulting from indirect job creation through the multiplier and capital outlays.

Local tax revenues in 2000 for cities, towns, villages, school districts, and fire districts in the three counties will total more than $5.6 million. Additional local tax revenues of $3,536,384 will be generated across the three-county area because of indirect job creation.

Federal and State Taxes

The income tax is the main source of the revenue for the federal government, generating in excess of 48% of all revenues in 1998.

Table 3-1. Federal and State Income Taxes Withheld (in millions)

| Year | Federal Taxes | State Taxes | Annual Total |
|---|---|---|---|
| 1997 | $5.9 | $1.6 | $7.5 |
| 1998 | 6.5 | 1.8 | 8.3 |
| 1999 | 6.8 | 1.9 | 8.6 |
| 2000 | 7.4 | 2.1 | 9.5 |

(Based on payroll statistics)

According to Table 3-1, federal income tax withholdings for non-Native American employees at the Nation increased from almost $5.9 million in 1997 to an estimated $7.4 million in 2000. Increased employment and



earnings account for this upward trend, with enhanced earnings playing a much greater role in the last two years.

[13]

Total withholdings may overestimate the amount federal income taxes paid because some employees may receive a refund from the federal government at the year of the year when they file their federal taxes. On the other hand, total withholdings may underestimate taxes paid because other workers may not have enough taxes withheld and, as a result, may have to make additional payments at the end of the year. In addition, total withholdings does not take into consideration the taxes paid by employees on any tips or gratuities they received.

Assuming these contrary forces negate one another, it is plausible to assume that overall withholds are a close approximation of the actual amount of federal taxes paid by non-Native Americans employed at the Nation.

In addition, Social Security and Medicare payments need to be taken into consideration. Social Security is funded through a payroll tax of 15.3% shared equally between the employer and employee up to a maximum level of $76,200 per worker. That translates into payments to the Social Security Administration of $9.7 million in 2000.

Slightly more than $17 million was paid in federal payroll taxes, which averages out to approximately $6,948 per non-Native American employee.

Assuming the additional jobs created via the multiplier effect, along with those resulting from capital outlays are similar in nature to those created by the Oneida Nation, an additional $12.2 million in federal payroll taxes

was generated in 2000. That brings the total payments in federal payroll taxes to $29.3 million.

It should be kept in mind that this figure is likely to underestimate the level of federal taxes paid because it does not consider the taxes that are paid by jobs outside New York State that are created by the multiplier effect.

State Taxes

It is estimated that workers at the Oneida Nation Enterprises paid $2,089,731 in state income taxes in 2000, or $848 per non-Native American worker. Adding in the revenues generated through capital outlays and indirect employment, the total is $3.5 million in 2000.

In addition, we need to take into account a variety of other taxes at the state level such as the sales tax, motor vehicle fees, and hospital patient fees. In 1999, New York State revenues, exclusive of the state income tax, federal aid, and lottery income equaled $25.177 billion. If that figure is divided by 8,580,667, which is the average number of workers employed in the state for the first nine months of 2000, the average amount of funds generated by each job through various taxes and fees can be estimated.

[14]

That figure equals $2,934. Adjusting downward to reflect the fact that wages in the three-county area are approximately 12% below the state average, it is estimated that each job in the region supported $2,582 in the state revenues in 2000.

Multiplying the 2,464 jobs directly created by the Nation yields $6.4 million in state revenues. The number is further adjusted to $7.4 million to reflect the fact that 393 Native American employees are likely to pay other forms of



state taxes, despite having the option of exemption from state income tax.

When the 1,760 jobs created indirectly or through capital outlays are taken into consideration, an additional $4.5 million will be generated in state revenues. Combining direct jobs with indirect jobs, $11.9 million in state revenues from various taxes and fees were generated in 2000.

In summary, $15.5 million in revenues will be generated for the State of New York from the economic activities at the Oneida Nation Enterprises in 2000. Twenty-three percent of that total results from state incomes taxes, while 77% will come from various fees and other forms of state taxation.

County Taxes

Table 3-2. Tax Revenues for the Three Counties in 1997 (in millions)

| County | Total Tax Revenues | Property Taxes % | Sales Taxes % | Other % |
|---|---|---|---|---|
| Onondaga | $284.3 | 64.8 | 20.4 | 14.8 |
| Oneida | 91.4 | 51.4 | 47.7 | 0.9 |
| Madison | 25.1 | 75.1 | 24.0 | 0.9 |

Source: *Comptroller's Special Report on Municipal Affairs*

In order to estimate the tax revenues generated at the county level, information was obtained from the *Comptroller's Special Report on Municipal Affairs,* which can be found on the official New York State website, *http://www.osc.state.ny.us.* According to Table 3-2, in 1997, Madison County generated approximately $25.1 million in tax revenues, while Oneida and Onondaga counties generated $91.4 million and $284.3 million, respectively. (Note: 1997 was the latest year available.)

Dividing each one of these figures by the average number of jobs in 1997 shows the taxes supported by each employee. In Madison County, each job supported $744 in 1997. The same figure for Oneida and Onondaga counties equaled $861 and $1,256 respectively.

A portion of county taxes is paid in sales taxes and another portion is paid indirectly, as when one patronizes a local business, which in turn pays property or business taxes.

[15]

The 340 Nation employees residing in Madison County supported approximately $264,849 in county taxes in 2000. For Oneida County, 2,064 residents paid $1.8 million in county taxes. In Onondaga County, 247 Nation employees contributed $324,813 in county revenues.

A total of 1,585 workers gained employment either indirectly or because of capital outlays in the three-county region in 2000. Because it is impossible to determine the county of residence for all of these individuals, the average county tax burden per worker across the three counties is calculated, weighted by the proportion of workers residing in each county.

In 1977, that figure equaled $1,094 per worker. As a result, an additional sum of $1.8 million was generated in county taxes to be shared among the three counties. (These figures are adjusted for inflation.)

Added State Impacts

Two economic impacts directly accrue from the Oneida Nation's economic success. They come from payments made to New York State for the regulation of gaming. In 1999, the Nation paid $3.1 million, and in 2000, the Nation made payments of $1.3 million to the New York



State Racing and Wagering Board. In addition, fiscal year 2000 payments to the New York State Police totaled $738,444, according to a Nation report.

Collection of thruway tolls at Exit 33, in the vicinity of the Turning Stone Casino, produced approximately $3.4 million in 1997 and $3.7 million in 1998 for New York State. Based on a consistent increase in casino patronage and other Nation enterprises, the anticipated toll revenue was expected to reach $4 million for 1999, and $4.3 million in 2000.

Local Taxes

Local taxes are difficult to calculate given the multitude of taxes in place at the city, village, and school district levels. Data gathered by the New York State Comptroller's Office for 1997, the latest year available, shows the following:

Table 3-3. Tax Revenue for the Cities, Towns, Villages, School Districts, Fire Districts in Three Counties, 1997 (in millions)

| County | Total % Revenues | Property Taxes | Sales Taxes % | Other % |
|---|---|---|---|---|
| Onondaga | $480.83 | 85.8 | 13.1 | 1.1 |
| Oneida | 218.46 | 82.3 | 15.4 | 2.3 |
| Madison | 60.67 | 94.1 | 6.1 | 0.8 |

Source: *Comptroller's Special Report on Municipal Affairs*

A glance at table 3-3 demonstrates that local authorities rely heavily on property taxes as a method for generating revenue.

[16]

The table below shows local tax revenues paid per employee and total employee impact, using the same

methodology employed to estimate county taxes generated by Nation employees.

Table 3-4. Local Tax Revenues for the Three Counties

| County | Local Tax Revenues (Per Employee) 1999 | Local Tax Revenues (Total Employees) 2000 |
|---|---|---|
| Onondaga | $2,215 | $572,819 |
| Oneida | 2,059 | 4.5 million |
| Madison | 1,795 | 638,984 |

The weighted average of local taxes is multiplied by the number of indirect jobs, and those resulting from capital outlays, to get an estimate of the local taxes generated via indirect employment. In 1997, that total equaled $3.4 million or $2,131 times 1,585 workers. Adjusting for inflation yielded $3.5 million in 2000.

Property Tax Trend

Table 3-5. Municipal Property Tax Trend

| Municipality | Total Tax Rate Per $1,000 | | | | |
|---|---|---|---|---|---|
| Oneida County | 1997 | 1998 | 1999 | 2000 | 2001 |
| Augusta | 6.55 | 7.52 | 8.48 | 8.11 | 7.04 |
| Kirkland* | 4.41 | 4.40 | 4.40 | 4.39 | 4.39 |
| Vernon | 7.79 | 7.54 | 7.79 | 7.64 | NA |
| Verona** | 7.70 | 7.00 | 7.88 | 7.81 | NA |
| Vienna | 8.49 | 8.63 | 8.87 | 8.88 | NA |
| Rome (city) | 6.67 | 7.49 | 7.79 | 7.53 | NA |
| Sherrill (city) | 5.00 | 5.25 | 5.25 | 5.25 | 5.25 |
| Madison County | | | | | |
| Cazenovia | 8.03 | 7.87 | 7.90 | 6.77 | NA |
| Oneida (city) | 7.40 | 7.36 | 7.40 | 7.52 | NA |
| Lenox | 7.17 | 6.97 | 7.19 | 7.38 | NA |
| Stockbridge | 9.37 | 9.58 | 9.57 | 9.55 | NA |

*Town general tax rate only.
**Oneida County tax only. Town does not raise any town general tax.



[17]

Each county has a number of tax and special district rates that apply separately to villages, towns, schools and the county. The rates for each service are developed independently for the municipality or special district receiving the services. As such, the taxes raised by the various municipalities vary widely, and sometimes wildly.

The bottom line, however, is that the major tax rates, for general municipal services have remained relatively stable over the past five years. This stability reflects the constancy of local budgets and tax revenue, based on reasonably steady assessed values of the properties within the governing agency.

[18]

PART IV
Payroll Impacts

In 2000, the Oneida Nation Enterprises employed 2,857 individuals. Of that total, 2,618, or 91.6%, were full-time positions. In addition, 86% were non-Native Americans.

While total employment is down slightly from a high of 2,991 workers in 1998, overall employment has remained remarkably steady over the last four years, at between 2,850 and 3,000 workers. Clearly, these employment figures

indicate that the Oneida Nation Enterprises has become one of the most stable employers in the region.

This is a trait that should not be overlooked given the economic shocks the area economy has sustained over the last few decades with the closing of Griffiss Air Force Base and the departure of Lockheed-Martin and Chicago Pneumatic.

Table 4-1. Total Payroll, 1995-2000

| Year | Total Payroll (in millions) |
|---|---|
| 1995 | $41.5 |
| 1996 | 47.1 |
| 1997 | 47.9 |
| 1998 | 56.7 |
| 1999 | 60.0 |
| 2000 | 63.3 |

Total payroll at the Oneida Nation equaled $63,255.429 in 2000, which is up by 5.4% from the previous year. What makes this increase in payroll interesting is that it took place at time when overall employment at the Nation diminished by 125 workers. This trend can only take place if average wages are increasing.

The average pay for all employees equaled $22,140 in 2000. Average pay, including all payroll-related expenses such as fringe benefits, equals $26,634 per year. The bulk of the difference is accounted for by the cost of medical care insurance.

The average pay of full-time employees equals $23,539 per year. This figure is based on the assumption that all part-time employees work an average of 20 hours a week.





Three-County Impact

Figure 1 provides a look at where the Nation's employees reside. More than 92% of the workers reside in Oneida, Madison and Onondaga counties, with the vast majority living in Oneida County. Of the workers that do not live in the three-county area, 51 lives in Herkimer County; 36 reside in Oswego County, and the remaining 119 live in other counties.

* * *

FIGURE 1

These figures clearly indicate that the majority of the economic impact of the Oneida Nation Enterprises is felt in the immediate geographic region. In fiscal year 2000, workers who resided in the three-county region earned a total of $58.7 million, out of a payroll of $63.3 million.

If you add the wages earned by those jobs created indirectly or through capital outlays, the figure becomes substantially larger. Assuming the average wage for those workers equals $22,140, the total payroll impact through direct and indirect effects is $93.8 million. Almost $59 million of this total results from the wages of those individuals who work directly for the Nation. The remaining $35 million results from indirect job creation.

While a substantial sum, it underestimates the total payroll impact because it does not take into consideration fringe benefits, nor does it take into consideration possible tips or gratuities earned by some workers.

Quality of Jobs

When talking about the quality of employment, the two most important aspects are job stability and wages. Job stability has already been confirmed.

Table 4-2. A Comparison of Average Salaries

| | |
|---|---|
| Oneida Nation Enterprises | $22,140 |
| Elsewhere in NYS: | |
| Restaurant Cooks | 22,120 |
| Hotel Desk Clerks | 20,755 |
| Hosts and Hostesses | 18,143 |
| Amusement Games & Recreation Attendants | 16,608 |
| Cashiers | 15,894 |

*The report from the Bureau of Labor Statistics provides the mean annual salary for 1998.

The figures were adjusted for inflation.

(*Source: Bureau of Labor Statistics http://www.bls.gov/oes/state)*

A look at Table 4-2 indicates that average wages at the Oneida Nation Enterprises appear to be above industry standards for New York State, although the exact salaries paid to Nation employees was not available. The listed occupations were chosen because they are similar in nature to many of the jobs at the Nation.

What makes these figures even more interesting is that average wage of the five state jobs listed above is $18,704. In addition, in the Mohawk Valley, salaries tend to fall below the state average.







The Silver Covenant Chain Grants

The Oneida Nation is mindful of its impact on school districts where it owns land. Since January 1996, the Nation has offered Silver Covenant Chain Grants to six school districts. Since 1998, it has included Oneida County in the grants award program.

These grants have increased annually for each recipient, and that trend is expected to continue.

Table 5-1. Level of Awards

| District | 1996 | 1997 | 1998 | 1999 | 2000 | Totals |
|---|---|---|---|---|---|---|
| Canastota | $3,149 | $21,148 | $34,741 | $77,815 | $111,395 | $248,248 |
| Cazenovia | 34 | 70 | 808 | 1,562 | 1,601 | 4,075 |
| Oneida | 7,811 | 18,855 | 35,171 | 73,8831 | 94,538 | 230,258 |
| Stockbridge | 1,586 | 4,693 | 14,387 | 63,026 | 108,916 | 192,608 |
| VVS | 60,984 | 165,428 | 238,600 | 382,135 | 445,092 | ,292,239 |
| Madison | 0 | 0 | 0 | 5,074 | 10,361 | 15,435 |
| Morrisville | 0 | 0 | 0 | 0 | 2,588 | 2,588 |
| Oneida County | 0 | 0 | 78,762 | 163,040 | 45,411 | 287,213 |
| Total | $73,564 | $210,194 | $402,469 | $766,535 | $819,902 | $2,272,644 |

The total number of visitors to the casino/resort was 20,151,020 through 2000.

The Nation's 285-room hotel marked its third anniversary in September 2000, and with the addition of The Inn at Turning Stone, a 63-room motel, these two quality facilities have had large positive impacts on visitor spending in the area.

When the impact of the Nation's two hotels is combined with other three-county visitor spending figures, the annual spending by visitors to Oneida, Madison and parts of Onondaga County exceeds $172 million.

The Turning Stone hosts a wide variety of events that are particularly well received by the public, including prize fights between big name contenders, charitable telethon fund raisers, and celebrity performance drawing sell-out crowds.

The Nation's acquisition of two nine-hole golf courses, Pleasant Knolls and Sandstone Hollow, added diversity to the golfing opportunities at the resort. The newest one, Shenandoah Golf Course, is drawing a tremendous amount of enthusiasm among serious golfers.

The facility's reputation was enhanced in the summer of 2000 when Turning Stone hosted a pro golfer's "skins game," and a pro-am tournament. In addition, Shenandoah Golf Course received Audubon International's highest ranking—Certified Signature Sanctuary Status—for its commitment to environmental sensitivity. It is the first golf course operated by an Indian Nation, and the 17th golf course in the U.S., to receive this designation.



The resort drew 105,524 visitors to the Showroom through September 2000. Since its opening in March 1999, 23,604 people have visited the Convention Center, 7,719 players have played Pleasant Knolls since its opening in April 1999, and 3,970 golfers have played Sandstone Hollow since July 1999. In 20 months, these four operations have boosted attendance at the casino/resort by almost 133,000 people.

Table 6-1. Annual Number of Visitors

| Year | Guests (in millions) | Percent change |
|---|---|---|
| 1995 | 2.1 | -- |
| 1996 | 2.4 | 17 |
| 1997 | 2.5 | 5 |
| 1998 | 3.4 | 35 |
| 1999 | 3.6 | 5 |
| 2000 | 3.5 | -1 |

[23]

In 1999, an average of 9,719 daily visitors came to turning Stone Casino. It increased to 9,824 in 2000. In 1999, the Oneida Nation Enterprises, excluding Turning Stone, drew 10,437 customers a day, and it creased to 11,026 daily in 2000.

In 2000, The Turning Stone Resort hotel, a 285-room facility, totaled 82,223 room nights filled. This is an average of 225 rooms per day over the year, representing an 80% occupancy rate. The Inn at Turning Stone during the same period had an occupancy average rate of 34 rooms per day, or 54% occupancy. The projected numbers for FY 2001 are a total room occupancy of 82,735, or 277 rooms per day. The Inn at Turning Stone also is anticipated an increase to 13,908 rooms, or 38 rooms per night.

The Nation's recreational vehicle park had 16,933 sites occupied in 2000, and is anticipating a 5% increase to 17,848 in FY 2001.

The Turning Stone Resort provided a partial attendance count of 36,776 patrons in 1999. The total attendance figures for 2000 are 68,798 patrons, with a projection of 83,500 people in FY 2001.

Conventions brought 10,883 people to the resort in 2000. It is projected to reach 15,047 in FY 2001. The convention banquet center entertained 78,353 guests in 2000, and expects to greet 96,858 guests in FY 2001.

Table 6-2. Visitor Spending Trends (Oneida County)

| Year | 1st Quarter | 2nd Quarter | 3rd Quarter | 4th Quarter | Total (in millions) |
|---|---|---|---|---|---|
| 1995 | $23.1 | $17.3 | $26.2 | $38.2 | $104.8 |
| 1996 | 24.4 | 19.1 | 27.1 | 37.1 | 107.7 |
| 1997 | 21.4 | 18.8 | 27.8 | 42.4 | 110.3 |
| 1998 | 21.9 | 20.1 | 30.8 | 48.3 | 121.2 |
| 1999 | 23.8 | 20.2 | 30.2 | 44.6 | 118.9 |
| 2000 | 25.1 | 19.9 | 30.9 | 44.4 | 120.3 |

*The numbers have been updated to actual dollars for all the years shown, as determined by various county tourist agencies.*

In Madison County, visitor spending amounted to $20.4 million in 1995, and has remaining fairly steady over the years. There was a slight decrease to $19.8 million in 2000.

[24]

Table 6-3. Visitor Spending at Oneida County Hotels, 1998-2000 (in millions)



| | 1998 | 1999 | 2000 | Percent change |
|---|---|---|---|---|
| Impact without Turning Stone Resorts and Inn | $121.2 | $118.9 | $120.3 | -0.0 |
| Impact from Turning Stone Resorts and Inn | 41.2 | 48.4 | 54.8 | 0.3 |
| Total Impact | $162.4 | $169.2 | $175.1 | 0.07 |

The above table shows the impact on Oneida County from visitor spending.

Hotel Occupancy Tax Trends

Trends in receipts for hotel taxes in Oneida County vary from quarter to quarter. Visitor spending trends are extrapolated from these data, and do not include the impact of the Nation's hotel properties.

Table 6-4. Hotel Receipts in Oneida County, 1995-2000

| Year | 1st Quarter | 2nd Quarter | 3rd Quarter | 4th Quarter | Total |
|---|---|---|---|---|---|
| 1995 | $65,244 | $49,000 | $74,000 | $108,000 | $296,244 |
| 1996 | 69,000 | 54,000 | 76,500 | 105,000 | 304,500 |
| 1997 | 60,500 | 53,000 | 78,614 | 119,800 | 311,914 |
| 1998 | 62,000 | 57,000 | 87,000 | 136,500 | 342,500 |
| 1999 | 67,500 | 57,000 | 85,425 | 126,100 | 336,025 |
| 2000 | 71,100 | 56,265 | 87,425 | 125,375 | 340,165 |

During the review of hotel room tax revenue, it was noted that conventions and large group gatherings throughout the individual counties are not always shared with local tourism agencies. If for no other reason than the planning of

upcoming large group conventions, this information needs to be coordinated. Long-term room availability requires cooperative planning from all groups, both Native American and non-Indian.

Impact of Tourism on Area Attractions

Based on interviews with area directors and managers of local venues, there is a sense generally, that the Turning Stone Casino and Resort has a positive effect on the tourism industry in Madison, Oneida and Onondaga counties.

The Boxing Hall of Fame in Canastota, the Adirondack Scenic Railroad, the Baseball Hall of Fame, the annual Utica Boilermaker Race, Fort Stanwix in Rome and Munson-



Williams-Proctor Institute are, in their own right, major draws to the area. While Turning Stone Casino and Resort is by far the largest draw, each separate facility and attraction complements the other.

In 1999, Turning Stone Casino attracted 3.54 million registered players, and in 2000, the number decreased slightly to 3,50 million. The number of customers, excluding Turning Stone Casino and Resort, totaled 3.8 million in 1999, and increased to 4 million in 2000.

Table 6-5. Origin of Visitors To Turning Stone Casino

| Area | Number of Visitors | Percent of Total |
|---|---|---|
| Utica/Rome | 711,369 | 32.2 |
| Syracuse | 710,182 | 32.2 |
| Miscellaneous NY areas | 265,366 | 12.0 |
| Albany/Schenectady | 187,666 | 8.5 |



| | | |
|---|---|---|
| Rochester | 172,229 | 7.8 |
| All other U.S. states | 83,356 | 3.8 |
| States Bordering NY (PA, CT, VT, NJ, NH) | 35,329 | 1.6 |
| Metro NYC | 27,434 | 1.2 |
| Canada | 15,551 | 0.7 |

Close to two-third (64%) of the visitors to the Turning Stone Casino are drawn from a 50-mile radius. All other areas of New York State, including metropolitan New York City, account for 652,695 visitors, or less than half of the number from Central New York.



PART VII
Housing and Real Estate Activity

There continues to be an active market for low-to-medium priced residential properties in Oneida County and Madison County, while high-priced homes are in very scarce supply. There has been an increase in the price level for these lower- to middle- range residences. (Note: Zogby International and the realtors agreed on these definitions: low-priced, below $70,000; medium, $70,000-$130,000; high, $130,000+.)

Commercial properties of all types are in short supply, both storefronts and new commercial developments.

The lagging price recovery of the mid-1990s, which slowed in 1998, has now regained strength, and prices are increasing by an estimated 3% of assessed value.

Land sales throughout the region are very active, and the price per undeveloped acre has remained firm, with moderate increases.

In general, the real estate brokers surveyed in the greater Oneida-Madison-Onondaga county areas are positive about the future of Central New York, in large part due to the Oneida Nation's business success and the peripheral impact on other business and residential interests.

Deed Transfers

[27]

In the latest survey, conducted in October 2000, many lower- to middle-priced houses are selling within reasonable time frames. High-priced and lease/rentals are hard to find, or if they are available, difficult to move.

Oneida County has maintained a steady, but not a dramatic increase in sales and value, while Madison County has experienced brisk activity, mostly in lower to moderately-priced homes.

In Madison County, high-end housing is especially scarce, as is commercial property and developed industrial space. In many towns throughout the county, there is a concern about a decrease in assessed value for town tax purposes. At the present time, tax rates remain remarkably stable.

Real estate agents and brokers are generally upbeat about the market in 2000. Their responses to questions regarding real property trends, and economic events affecting those trends, reflect optimism.

We asked, "In your area, how would you categorize the demand trend in real estate generally?"

*In the Oneida/Madison County areas where I work, the demand is on the upswing, slightly above average and getting better.* Canastota Realtor



*The market in the Oneida area is better than it has been.* Oneida City Realtor

*I deal with real property in Oneida/Madison counties and some in Onondaga County. I think the market, while not rapidly improving, is getting better.* Chittenango Realtor

*We have a great demand for apartments, and just don't have enough. There are very few available.* Vernon Area Realtor

*The demand is going up. There is a high demand for apartments, and we don't have many available.* Greater Oneida City Realtor

*The demand for residential property in Madison County and the small bit of Onondaga County where we work is relatively high. The lower to moderate priced homes are most in demand.* Madison County Broker

*We find the demand trend getting better. I represent sellers and buyers in Madison, Oneida and Onondaga counties, and there is a moderately strong demand for homes in all areas.* Oneida Broker

[28]

"How would you define the value trend in real property sales?"

*The prices are on the rise as homes are harder to find.* Oneida County Broker

*The value level of the lower priced and moderate homes is getting stronger. The prices are coming up gradually.* Vernon Area Realtor

*The value across the board is improving. In the moderately-priced category, the prices are edging up to around 3% above assessed value.* Oneida/Madison County Broker

"How would you define the trends in commercial property demands and values in your area?"

*The demand and value trends are somewhat strong in western Oneida County and eastern/northeastern Madison County. There is a shortage of commercial properties, storefronts, and we could use some commercial development.* Oneida city/Canastota Realtor

*The demand for commercial fronts is above average, and the availability is scarce.* Oneida County/Madison County Realtor

*I handle a lot of commercial properties. I find the demand is high, but the value hasn't caught up.* Onondaga County Realtor

*We are always looking for commercial space, there just doesn't seem to be enough.* Vernon/Verona Area Realtor

"What economic events have affected real property values in the past two years?"

*The effect of the air base closing is still with us, but not as bad as earlier. The positive side is that the economy has improved and is remaining strong throughout the country, but to a lesser extent here in Central New York.* Oneida County/Vernon Realtor

*There is more job stability now, and the economy in the area has gotten stronger.* Madison County Broker

*Things have been going good since the Oneida Indians started the casino. The new golf course and resort have*



*helped. People are more apt to locate here now.* Oneida (City)/Madison County Broker

*The Thruway entrance is a big help, so people can commute to Utica or Syracuse easily. The Oneida Nation has flourished and that has helped bring other businesses. They find Central New York good for business. I am very positive about the future here.* Oneida County/Madison County Realtor

[29]

PART VIII
Construction Industry

Residential Construction

Following a period of sluggish new residential construction starts through the mid-1990s, an upward move began in 1998 and continued into 2000. The increase, in both volume and dollar volume of new starts, is due to two factors. The economy nationwide has generated more interest in new residential investments, plus the local economy has rebounded from the loss of several major employers.

According to officials at the Mohawk Valley Builders Exchange, the local economy has provided work for any contractors "who are willing to work."

Although there is still a shortage of multiple family units in the Oneida-Madison Counties, there has been some effort to invest in new apartment starts in the past year. Industrial construction has seen a recent increase in new capital investment.

The Oneida Nation invested $12.9 million in new building starts in 1998. By 1999, its spending on capital improvement and construction jumped to $31.5 million.

Combined with the investments in lease/hold improvements and other building improvements, the Nation invested $36.5 million in 1999.

In 2000, the Nation's investments in buildings, lease/hold improvements, and building improvements totaled $15 million. Projects in 2000 included golf course improvements, estimated at $10 million, and an estimated $2.4 million worth of construction improvements at the Oneida Lake marina. [30]

SUPREME COURT, U.S.
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(14)

No. 03-855

IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner*,

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether alleged reservation land is Indian country pursuant to 18 U.S.C. § 1151 and this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*") where the land was neither set aside by the federal government nor superintended by the federal government?

2. Whether alleged reservation land was set aside by the federal government for purposes of Indian country analysis under 18 U.S.C. § 1151 and *Venetie* where the 1788 Treaty of Fort Schuyler terminated all aboriginal title and the alleged reservation was established by the State of New York in the 1788 Treaty of Fort Schuyler, and not by any federal treaty, action or enactment?

3. Whether the 1838 Treaty of Buffalo Creek, which required the Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneida's alleged New York reservation?

4. Whether alleged reservation land may (i) remain Indian country or (ii) remain subject to the protections of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, if the tribe claiming reservation status and Indian Trade and Intercourse Act protection ceases to exist?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were petitioner City of Sherrill, New York and respondents Oneida Indian Nation of New York, Ray Halbritter, Keller George, Chuck Fougnier, Marilyn John, Clint Hill, Dale Rood, Dick Lynch, Ken Phillips, Beulah Green, Brian Patterson and Iva Rodgers. Respondent Ruth Burr was a party in the district court and Second Circuit, but a suggestion of death of Ruth Burr was filed in the Second Circuit on May 10, 2002. Madison County, Oneida County and the State of New York appeared as *amici curiae* in the district court, Second Circuit and in connection with the petition to this Court.



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## BRIEF FOR PETITIONER

The City of Sherrill ("Sherrill" or "Petitioner") respectfully requests that the judgment of the Second Circuit, affirming judgments of summary judgment for the Oneida Indian Nation in the district court, be reversed.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 337 F.3d 139. PA 1-60.[1] The order denying the Petition for Rehearing or Rehearing *en banc* is unreported. PA 134-35. The memorandum decision and order of the district court is published at 145 F. Supp.2d 226. PA 61-133.

## JURISDICTION

The judgment of the Court of Appeals was issued on July 21, 2003. The Petition for Rehearing or Rehearing *en banc* was denied on September 15, 2003. A Petition for a Writ of Certiorari was filed on December 11, 2003, and this Court granted a writ of certiorari on June 28, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

## TREATY, CONSTITUTIONAL AND STATUTORY PROVISIONS

The following treaty, constitutional and statutory provisions are involved in the case: The 1788 Treaty of Fort Schuyler, September 22, 1788; the 1794 Treaty of Canandaigua, November 11, 1794, 7 Stat. 44; the 1838 Treaty of Buffalo Creek, January 15, 1838, 7 Stat. 550; the

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[1] Citations to "PA __" are to the Appendix to the Petition for a Writ of Certiorari filed in this matter.

Tenth Amendment to the United States Constitution; 18 U.S.C. § 1151; 25 U.S.C § 177; 25 U.S.C. § 233; and 25 U.S.C. § 465. Their text (other than the Tenth Amendment) appears in the appendices to the Petition for a Writ of Certiorari at pages PA 136 through PA 184.[2]

## STATEMENT OF THE CASE

### The Parties

Petitioner City of Sherrill is a municipal corporation organized under the laws of the State of New York. It is New York's smallest city, occupying one and one-half square miles, with a population of approximately 3,000. Its total annual budget is approximately $2.4 million. CA 201-37, 722-57, 798-801.[3]

Respondent Oneida Indian Nation of New York ("Oneida Indian Nation") is presently a federally recognized Indian tribe governed by a Nation Representative and a Tribal Council. Respondent Ray Halbritter is the Nation Representative, chief executive officer of the Oneida Nation enterprises, and one of the members of the Council. The other Respondents are members of the Council.

### The Relevant History of the Oneida Indians

1. The Treaties of Fort Schuyler and Canandaigua

Prior to and during the Revolutionary War, the colonists respected the Oneidas' right to possession of their aboriginal lands, which totaled approximately six million acres in central New York. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d 226, 233-34 (N.D.N.Y. 2001). In 1788, in the Treaty of Fort Schuyler with the State of New York, the Oneidas sold all of their land to the State of New York. PA 136. The initial paragraph of the 1788 Treaty of Fort Schuyler states, in its entirety, "First, The Oneidas do cede and grant all their lands to the people of the State of New York forever." Then, in the second paragraph of the Treaty, the State of New York expressly created a 300,000-acre reservation for use by the Oneidas. *Id.* at 136-38 That treaty and sale terminated aboriginal title to the land.

Two years later, in 1790, Congress passed the first Indian Trade and Intercourse Act, currently found at 25 U.S.C. § 177, which required the federal government to approve all sales or transfers of land from any Indian nation or Indian tribe. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d at 234. As they had prior to the passage of the Indian Trade and Intercourse Act, the Oneidas continued to sell large portions of the land that New York State had set aside for their use.

In November 1794, the United States entered into the 1794 Treaty of Canandaigua, 7 Stat. 44, with the Six Nations of the Iroquois – the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora tribes. PA 141-46. With respect to the Oneidas, article 2 of the 1794 Treaty of Canandaigua **acknowledges** the reservation established by the State of New York:

> The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never

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[2] The Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[3] Citations to "CA ___" are to the joint appendix in the Second Circuit Court of Appeals. Citations to "JA ___" are to the Joint Appendix in this Court.

> claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase. (PA 141; emphasis added).

On the other hand, as to the Senecas, the specific metes and bounds of the reservation set aside by the federal government are described in detail, and no prior State reservation is mentioned. (PA 142).

In 1795, the Oneidas sold a substantial portion of what remained of their 300,000-acre reservation created by the State of New York. *Oneida Indian Nation*, 145 F. Supp.2d at 234. Since 1795, title to most of these 300,000 acres has passed through voluntary, free-market transactions. *Id.* The transactions that conveyed the properties in Sherrill at issue in this case (the "Properties") occurred in 1805, when the Properties were conveyed by a group of Oneida Indians to Cornelius Dockstader, an Oneida Indian. In 1807, Dockstader conveyed them to Peter Smith, a non-Indian. *Id.* at 243; CA 407-15.

2. Indian Removal and the Treaty of Buffalo Creek

Beginning in the early nineteenth century, the federal government's policy toward the Indians changed from respect for the Indians' possession of their ancestral lands to removal of the eastern Indians to lands in the western United States. Between 1820 and 1822, and in keeping with the federal government's new policy, some New York Indians, including some Oneidas, relocated to land the federal government purchased for them in the state of Wisconsin. *Oneida Indian Nation*, 145 F. Supp.2d at 234-35. Other



Oneidas relocated to Ontario, Canada. *Id.* at 235. Thus, the Oneidas split into three groups: Oneidas in New York, Oneidas in Wisconsin and Oneidas in Canada (also known as the Thames Oneidas). *Id.* The Oneida Indian Nation of New York claims to be a successor to those Oneidas who remained in New York.

The federal government codified its removal policy in the Indian Removal Act, 4 Stat. 411 passed by Congress in 1830, which authorized the federal government to give land west of the Mississippi River to Indians in exchange for their eastern land. *Id.* "The core purpose of the federal removal policy was to mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

One result of the federal policy of removal was the 1838 Treaty of Buffalo Creek, 7 Stat. 550, an obligatory removal treaty in which the New York Indians, including those Oneidas who had not yet removed from New York, agreed to abandon lands east of the Mississippi and remove to Kansas. PA 147-78. In Article 2 of the treaty, the United States designated a 1,824,000-acre reservation in what is now the State of Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States . . ." PA 149-50. In Article 13, all Oneidas living in New York agreed to remove to their new home in Kansas. PA 155.[4]

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[4] At the time of the 1838 Treaty of Buffalo Creek, there were 620 Oneidas in New York and 600 in Wisconsin. Most of the remaining Oneidas left New York in the next few years. *The Oneida Indian Experience: Two Perspectives*, 61 (J. Campisi and L. Hauptman eds. 1988).

The Treaty of Buffalo Creek is explicit about its background and purpose. Its preamble recounted over 20 years of federal efforts to remove the New York Indians, including the Oneidas, from New York. Preamble, 7 Stat. at 550-51. PA 147-48. The express purpose of the treaty was to carry out the "policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory." Preamble, 7 Stat. at 551. PA 148. Thus, the Treaty of Buffalo Creek was intended "to release the Eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites," *New York Indians v. United States*, 40 Ct. Cl. 448, 450 (1905). The Treaty of Buffalo Creek was thus intended to end the very types of jurisdictional conflicts at issue here.

The legislative history of the treaty also indicates that it implemented then-existing federal removal policy:

> A territory west of the Mississippi has been procured, and sacredly set apart by this Government, amply sufficient for the location of all the remnant tribes of Indians which may be found remaining in all the States and Territories of this Union. It is the settled policy and wish of this Government thus to locate these Indians.

Speech of Senator Lumpkin of Georgia, *Appendix to the Congressional Globe*, 26th Cong., 1st Sess., 285, 286 (March 19, 1840).

The Treaty of Buffalo Creek expressly provided for the removal of the Oneidas from New York: the Oneidas and the other New York Indians ceded to the United States lands previously granted them in Wisconsin (except for a tract that became the present Oneida reservation in Wisconsin) and received a new 1,824,000-acre reservation in modern-day



Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes . . ." Arts. 1, 2, 7 Stat. at 551-552. PA 148-50. The new reservation was to be the "future home" for, among others, the 620 "Oneidas . . . [then] residing in the State of New York." Art. 2, Sch. A, 7 Stat. at 551-552, 556. PA 149-50, 160-61.[5]

The Treaty of Buffalo Creek provided that the Oneidas could henceforth "establish their own form of government, appoint their own officers, and administer their own laws" on the Kansas lands designated as "their new homes." Art. 4, 7 Stat. at 552. PA 150-51. The treaty's terms restricted the Oneida's exercise of these powers of tribal sovereignty and jurisdiction to "said country," *i.e.*, the part of the new reservation specifically delineated for occupation by the Oneidas. Arts. 4, 5, 7 Stat. at 552. PA 150-51. Finally, the treaty provided for the disposition of the Oneidas' remaining lands in New York. The Oneidas "hereby agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements

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5 The court below incorrectly held that the Oneidas in New York were not intended to share in the Kansas lands because they "had a permanent residence in New York State." *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 162 n.17 (2d Cir. 2003). The Treaty of Buffalo Creek set apart an amount of land in Kansas more than sufficient to provide 320 acres to each of the New York Indians enumerated in the census set forth in Schedule A to the treaty, including the 620 New York Oneidas. *See* Sch. A, 7 Stat. at 556; *New York Indians v. United States*, 40 Ct. Cl. 448, 458 (1905). The treaty specifically provided that the Kansas lands were "intended as a future home" for the Oneidas residing in the State of New York. 7 Stat. at 551-52. Moreover, as discussed below, the fact that the Kansas lands were intended to be the new home of, among others, the Oneidas still living in New York was shown by the fact that their descendants shared in the recovery in *New York Indians v. United States*, 170 U.S. 1 (1898).

with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. at 554. PA 155.

Although most of the Oneidas remaining in New York did not move to Kansas to live on the reservation designated for their benefit in the Treaty of Buffalo Creek, they and other New York Indian tribes sued the United States for the value of the Kansas lands after the federal government sold the Kansas lands to homesteaders. *New York Indians v. United S.ates*, 170 U.S. 1 (1898). Their lawsuit was successful, and the Oneidas living in New York, Wisconsin and Canada shared in the nearly $2 million recovery. *Id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the Oneidas sought and received the benefit of the Kansas reservation established in exchange for their New York lands in the 1838 Treaty of Buffalo Creek.

3. The Lapse In Oneida Tribal Existence

There is substantial evidence that, following the 1838 Treaty of Buffalo Creek, the Oneidas ceased to exist as a tribe in New York for nearly a century. For example, in 1877, a district court noted that "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).

Similarly in 1891, the federal government explained that "The Oneida Indians have no reservation.... [The few



Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* (CA 1228-31.) That same observation was oft repeated over the following decades. *See 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*; *1900 Annual Report of the Department of the Interior*; *1901 Annual Report of the Department of the Interior*; *1906 Annual Report of the Department of the Interior*. That point is also made in the 1892 Census Map of New York, which depicts no Oneida reservation. CA 900-95, 1221-56.

That situation persisted into the mid-twentieth century. For example, the record below established that in 1925, an Assistant Commissioner of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). CA 1180-83. Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

**The Action Below**

In 1997 and 1998, the Oneida Indian Nation used the proceeds from its Turning Stone casino in Verona, New York to purchase several businesses and properties in Madison and Oneida Counties, New York in open-market transactions with private parties. Included in these purchases were the Properties in Sherrill upon which the Oneida Indian Nation

operates a gas station (with an attached convenience store) and a textile manufacturing and distribution facility.

Contending that the Properties were located within its historical reservation, the Oneida Indian Nation refused to pay property taxes assessed by Sherrill on the land and structures, or to collect sales tax on sales of merchandise sold at their businesses. Sherrill sent the Oneida Indian Nation notices of tax delinquency for the Properties and thereafter conducted a tax sale, purchased the Properties and initiated eviction proceedings in New York State Supreme Court (the "Eviction Case").

The Oneida Indian Nation then sued Sherrill in the United States District Court for the Northern District of New York, seeking a declaratory judgment that the Properties were situated on land that was part of its historic reservation, which they claim was established by the 1794 Treaty of Canandaigua and, therefore, exempt from state and local taxation (the "Lead Case"). The Oneida Indian Nation also removed the Eviction Case to federal court, and contended that Sherrill's claims were barred by sovereign immunity. In response, Sherrill commenced an action against the individual members of the Oneida Tribal Council (the "Members Case"). The Eviction, Lead and Members Cases were subsequently consolidated and adjudicated in district court.

In a June 4, 2001 memorandum-decision and order, the district court: (1) denied Sherrill's motion in the Lead Case for summary judgment or, alternatively, a preliminary injunction enjoining the Oneida Indian Nation from purchasing additional properties in Sherrill; (2) granted the Oneida Indian Nation's cross motion for summary judgment in the Lead Case and granted Oneida Indian Nation's motion for summary judgment in the Eviction Case; (3) granted summary judgment dismissing Sherrill's counterclaims



against the Oneida Indian Nation in the Lead Case; (4) granted defendants' motion to dismiss the Members Case; and (5) denied Sherrill's motion for leave to amend its answer in the Lead Case. *Oneida Indian Nation*, 145 F. Supp.2d at 266-67.[6]

The City of Sherrill appealed and, to the extent pertinent here, the Second Circuit affirmed (in a 2-1 decision), with Senior Circuit Judge Van Graafeiland dissenting. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Court of Appeals found that the Properties were Indian country because the reservation had been established, not by New York State in the 1788 Treaty of Fort Schuyler, but rather by the federal government in the 1794 Treaty of Canandaigua, 7 Stat. 44. The Second Circuit rejected any notion that the 1838 Treaty of Buffalo Creek, 7 Stat 550, required the New York Oneidas to abandon their lands in New York State and move to Kansas. Finally, the Second Circuit held that tribal continuity is not required for a tribe to maintain reservation status and Indian Trade and Intercourse Act protection – that is, a reservation and Indian Trade and Intercourse Act protection continues even if a tribe ceases to exist. 337 F.3d at 155-68. The City of Sherrill petitioned for rehearing or rehearing *en banc*; that petition was denied on September 15, 2003.

**Prior Oneida Litigation In This Court**

This case is one of many lawsuits the Oneida Indian Nation has filed in an attempt to undo the 1788 Treaty of Fort Schuyler, 1838 Treaty of Buffalo Creek and the land transactions its ancestors entered into with New York State beginning over two hundred years ago. Indeed, these disputes have twice before been to this Court:

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6 That same day, the district court also entered three separate final judgments disposing of all parties' claims.

*Oneida Indian Nation of New York State v. County of Oneida, New York*, 414 U.S. 661 (1974) ("*Oneida I*") – In 1970, the Oneida Indian Nation of New York and the Wisconsin and Thames Oneidas brought suit against Oneida and Madison Counties (the "Counties") in the Northern District of New York to recover the fair rental value of certain land possessed by the Counties for the period January 1, 1968 through December 31, 1969. *Id.* at 664-65. The Oneidas claimed that the land at issue was part of the approximately 125,000 acres sold by the Oneidas to New York State in 1795, allegedly in violation of the Indian Trade and Intercourse Act. *Id.* This Court held that the Oneidas' complaint stated a controversy arising under the Constitution, laws, or treaties of the United States, and therefore that the district court erred in dismissing it for lack of federal question jurisdiction. *Id.* at 666.

*County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("*Oneida II*") – This Court in *Oneida I* remanded the case to the district court for trial. On remand, after a trial in which the Counties presented no evidence, the district court held, *inter alia*, that the Counties were liable for wrongful possession of the lands conveyed to New York State in 1795 because that conveyance violated the Indian Trade and Intercourse Act. *Id.* at 232-33. The Court awarded damages for the fair rental value of the land for the two-year period specified in the complaint. *Id.* at 230. The district court's decision was appealed. This Court held that the Oneidas could maintain an action for violation of their possessory rights based on federal common law. This Court also held that the Oneidas had a cause of action under federal common law (*id.* at 236) and that the action was not barred by the defenses of statute of limitations, abatement, ratification or nonjusticiability. *Id.* at 240-50. This Court declined to rule on whether laches barred the Oneidas' claim. *Id.* at 244-45.



This Court in *Oneida II* was not presented with and did not address the effect of the 1788 Treaty of Fort Schuyler or the 1838 Treaty of Buffalo Creek. Indeed, the Treaty of Fort Schuyler is not cited at all and the only place the 1838 Treaty of Buffalo Creek is mentioned in *Oneida II* is in the dissenting opinion, where Justice Stevens observed that "[t]here is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek, which ceded most of the Tribe's lands in Wisconsin to the United States in exchange for a new reservation in [Kansas]." 470 U.S. at 269 n.24.

## SUMMARY OF ARGUMENT

1. The Second Circuit's decision that the Properties are Indian country is in direct conflict with this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) and the 1788 Treaty of Fort Schuyler. In *Venetie*, this Court held that for property to be Indian country and exempt from taxation it (1) must have been set aside by the federal government for use of Indians as such; and (2) must be under the superintendence of the federal government. The Properties here were neither: they were set aside by the State of New York and superintended by the State of New York and local governments.

In the 1788 Treaty of Fort Schuyler, prior to the effective date of the United States Constitution, the New York Oneidas ceded all of their territory to the State of New York. That cession terminated all aboriginal title. The State of New York then set aside approximately 300,000 acres for the Oneidas' future use. In 1794, the federal government, in the Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create a reservation for the Oneidas.

The governing treaties and this Court's controlling case law compel the conclusion that the Properties are not Indian country under 18 U.S.C. § 1151. Although § 1151 has three prongs – reservations, dependent Indian communities and allotments – this Court made clear in *Venetie*, 522 U.S. at 527, that the essential nature of Indian country is the same under all three prongs of the statute: the land (1) must be set aside by the federal government for use of Indians as such and (2) must be under the superintendence of the federal government.

The land at issue was neither set aside nor superintended by the federal government. Rather, the land was set aside for the use of the Oneidas by the State of New York in the 1788 Treaty of Fort Schuyler. Moreover, as in *Venetie*, the Oneidas own the Properties in Sherrill in fee simple and are free to use them for any purpose, including any non-Indian purpose.

Nor are the Properties federally superintended. For two centuries, State and local governments have provided all services with respect to the land at issue. The level of federal superintendence over Indian land required for Indian country status is that the federal government "actively controls the lands in question, effectively acting as a guardian for the Indians." *Venetie*, 522 U.S. at 533. In other words, the land must be "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians." *Id.*

Tested by that standard, the Properties are not federally superintended. The federal government never actively controlled the Properties. The federal government never exercised jurisdiction over the Properties, as guardian and protector of Oneida Indian Nation. The Oneida Indian Nation purchased the Properties in fee simple and has since opened businesses on the acquired land. Services for the



Properties are provided by Sherrill and not by the federal government. As a result, the land at issue is not Indian country pursuant to 18 U.S.C. § 1151, and may be taxed by the City of Sherrill.

Moreover, the Properties are freely alienable, even if they once were part of the Oneida reservation. That is so for because the Properties are not subject to the protections of the Indian Trade and Intercourse Act, 25 U.S.C. §177. In such circumstances, reservation status is only available by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998).

Thus, the Properties are not Indian country.

2. The 1838 Treaty of Buffalo Creek, 7 Stat. 550, required the Oneidas to abandon all lands in the State of New York and remove to Kansas, thus terminating any remaining Oneida reservation in New York.

In Article 1 of the Treaty, the Oneidas and other tribes accepted a tract of land in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York . . ." The Oneidas also agreed that the Kansas land was to be their "future home" and "agree[d] to remove to their new homes . . . as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.*, Arts. 2, 13. As this Court has recognized, the agreement by the Oneidas and others to abandon all eastern lands was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Thus, Congress intended, and the Oneidas agreed, to remove permanently from New York and Wisconsin and move to Kansas.

Any doubt that the 1838 Treaty of Buffalo Creek disestablished the Oneidas' New York reservation was put to rest by this Court when Indian tribes including the Oneidas successfully sued the federal government for the value of the Kansas lands that were set apart for them in the treaty, but later sold by the federal government after the tribes refused to remove to them.

This Court held in *New York Indians v. United States*, 170 U.S. 1, 19 (1898), that the Treaty was an effective grant of lands and descendants of the Oneidas from New York shared in the nearly $2 million recovery. *New York Indians v. United States*, 170 U.S. 1 (1898); *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). The Oneidas from New York shared in that recovery because they held title to the Kansas lands granted to them by the 1838 Treaty of Buffalo Creek. That grant was not a gift. Rather, it was made in consideration of the Oneidas' agreement to move from and disestablish their New York and other eastern homes.

Thus, the 1838 Treaty of Buffalo Creek terminated any Oneida reservation in New York.

3. There was substantial evidence below that the Oneidas ceased to exist as a tribe in New York for decades in the late nineteenth and early twentieth centuries. If tribal status ceased, Indian country status and the protections of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, ceased, and the only way that the New York Oneidas could recover reservation status was by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Thus, at the very least, summary judgment for the Oneida Indian Nation was improper.



## ARGUMENT

### I. UNDER THIS COURT'S DECISION IN *VENETIE* AND THE 1788 TREATY OF FORT SCHUYLER, THE PROPERTIES ARE NOT INDIAN COUNTRY

The Second Circuit's decision below must be reversed because it ignores the 1788 Treaty of Fort Schuyler and this Court's holding in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), that for property to be Indian country and exempt from taxation it (1) must have been set aside by the federal government for use of Indians as such; and (2) must be under the superintendence of the federal government. The Properties here were neither: they were set aside by the State of New York and superintended by the State of New York and local governments; and the 1788 Treaty of Fort Schuyler terminated all aboriginal title.

The controlling legal issue here is whether the Properties are Indian country pursuant to 18 U.S.C. § 1151. The "Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 882 (9th Cir. 1999) (quoting *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987)); *see Venetie*, 522 U.S. at 527 ("Although [18 U.S.C. § 1151's definition of Indian country] by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction").

This Court has explained that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.'" *Oklahoma Tax Comm'n v. Citizen Band*

*Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). Reservation status for Indian country purposes is a term of art.

Indian country is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).

In *Venetie*, this Court explained that, in enacting § 1151 in 1948, Congress codified the two requirements that the Court had previously held necessary for a finding of Indian country (federal set aside and federal superintendence). *Venetie*, 522 U.S. at 527. Although § 1151 has three prongs[7] – reservations, dependent Indian communities and allotments – this Court made clear in *Venetie*, 522 U.S. at 527, that the essential nature of Indian country is the same under all three prongs of the statute: the land (1) must be set aside by the federal government for use of Indians as such and (2) must be under the superintendence of the federal government.

In the words of the this Court,

> [In our prior cases] . . . we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, dependent Indian communities, and allotments.

*Id.* at 530 (citations omitted).

Contrary to the decision below, the fact that land is labeled "reservation" land or is subject to the restrictions of the Indian Trade and Intercourse Act is not the test. Whatever the word "reservation" means in other contexts, reservation status for Indian country purposes requires federal set-aside and federal superintendence. As this Court observed as long ago as 1914 in *United States v. Pelican*, 232 U.S. 442, 449 (1914)(emphasis added), in describing the Colville reservation at issue prior to the creation of allotments, "the original reservation was Indian country

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[7] The Oneida Indian Nation makes no claim that its Sherrill Properties constitute a dependent Indian community or an allotment. *Oneida Indian Nation*, 145 F. Supp.2d at 244. Thus, only the "reservations" prong of § 1151 is at issue in this case.

Moreover, the Oneida Indian Nation concedes that, if the Properties are not Indian country, then the Properties are not exempt from taxation. Thus, although – as we demonstrate below – the Properties are not subject to the Indian Trade and Intercourse Act, 25 U.S.C. § 177, Indian Trade and Intercourse Act coverage is not dispositive on the question of Indian country. Indeed, the Second Circuit has held that the Indian Trade and Intercourse Act has broader reach than Indian country. *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government."

This Court made the same point in *Potawatomi*, 498 U.S. at 511 ("the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government'") (citations omitted) and other courts – unlike the Second Circuit below – have followed that lead. *Malabed v. North Slope Borough*, 42 F. Supp.2d 927, 933 (D. Alaska 1999)(citing Felix S. Cohen, *Handbook of Federal Indian Law*, 37 (1982 ed.) ("A reservation is, in effect, simply a more formal or officially recognized variant of a dependent Indian community. . . . [T]hat is, all reservations are lands set aside for the use of Indians under federal superintendence"); *see also Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 115 (1960)(lands owned by the Tuscarora Indian Nation are not within a reservation, as defined in the Federal Power Act, because they are "owned in fee simple" and "no 'interest' in them 'is owned by the United States'").

Neither federal set aside nor superintendence is present here. As a result, this Court should reverse the decision below and direct the entry of judgment for Petitioner.

**A. The Properties Were Set Aside By The State of New York**

1. The 1788 Treaty of Fort Schuyler Terminated Aboriginal Title and Set Aside A State Reservation

The Second Circuit ignored the express language of



the 1788 Treaty of Fort Schuyler in concluding that the Properties were set aside by the federal government for use of the Oneidas. The initial paragraph of the 1788 Treaty of Fort Schuyler states, in its entirety, "The Oneidas do cede and grant all their lands to the people of the State of New York forever."[8] Of this grant, New York reserved a 300,000-acre tract for the Oneidas' "specified uses." PA 136-38. Thus, it cannot be questioned that the State of New York, and not the federal government, set aside for use by the Oneidas the land upon which the Properties are situated. As a result, the Treaty of Fort Schuyler unambiguously extinguished the Oneidas' aboriginal title in the first article, and created a State in the second.

Early authorities confirm that the Oneidas ceded all their land to New York, receiving in return a limited grant of property from New York. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent), described the treaty as follows:

> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ceding the whole of their vast territory to the people of this State, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding twenty-one years.

*Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (emphasis supplied). Similarly, in 1831, Chief Justice Marshall noted that "some tribes" made pre-Constitution treaties with New York State "by which they ceded all their

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8 Occurring prior to the effective date of the United States Constitution, this sale was entirely lawful. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1148 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

lands to that state, taking back a limited grant to themselves, in which they admit their dependence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (emphasis added).[9]

Finally, identical language in a 1789 treaty between New York and the Cayuga Indians was construed consistent with *Cherokee Nation* and *Goodell* by a panel of arbiters that included Roscoe Pound, Dean of Harvard Law School. In reviewing a claim on behalf of the Cayuga Indians in Canada against the United States for annuities, the panel found that the Cayugas' title had been extinguished and the lands ceded to New York: "We think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession." Fred K. Nielsen, *American and British Claims Arbitration*, 326-27 (citing *Cherokee Nation*) (Government Printing Office 1926).

Thus, the 1788 Treaty of Fort Schuyler terminated aboriginal title to all Oneida land in New York and set aside a State reservation for the Oneidas.

2. The 1794 Treat of Canandaigua Merely Acknowledged The Existing State Reservation, And Did Not Create A Federal Reservation

The Second Circuit ignored the 1788 Treaty of Fort Schuyler and found that the Oneida reservation was set aside by the 1794 Treaty of Canandaigua. 337 F.3d at 155-56. That is incorrect. Rather, the 1794 Treaty of Canandaigua merely – and expressly – "acknowledged" the land reserved by New York State for the Oneidas.

Thus, in the 1794 Treaty of Canandaigua, Article 2

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9 Although Chief Justice Marshall does not specifically identify the Oneidas, he accurately described the 1788 Treaty of Fort Schuyler, as well as similar treaties with the Onondaga and Cayuga tribes.



provides, in pertinent part, that

> The United States acknowledges the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof . . .

That is to be contrasted with Article 3 of the treaty, which expressly establishes a reservation for the Senecas. PA 141-42.

Accordingly, the 1794 Treaty of Canandaigua was nothing more than an acknowledgment by the federal government of the Oneida reservation previously created by New York State in the 1788 Treaty of Fort Schuyler. It did not create a federal reservation.

That is confirmed not only by the express language of the Treaty of Canandaigua, but also by the historical context in which the treaty was negotiated. The purpose of the 1794 Treaty of Canandaigua was the resolution of a dispute with the Senecas; and the Senecas were the principal intended beneficiary of the Treaty of Canandaigua, not the other tribes of the Six Nations, including the Oneidas. *Seneca Nation of Indians v. New York*, 206 F. Supp.2d 448, 487 (W.D.N.Y. 2002). In 1782, New York ceded to the United States its claim to western lands (present-day Ohio), in exchange for a boundary fixed by the federal government. *Id.* at 473. Thereafter, in the 1784 Treaty of Fort Stanwix, October 22, 1784, 7 Stat. 15, the Six Nations released their claims to these western lands, in which, among the Six Nations, only the Senecas had an interest. *Id.* at 478-80. The 1784 Treaty

of Fort Stanwix caused discontent among the Senecas, who felt they had been required to relinquish too much land and were affected by inadvertent geographical errors in setting boundaries. *Id.* at 480-86. By 1794, this discontent caused the Senecas (and possibly other Iroquois tribes) to consider joining the active warfare between the western Indians and the United States. *Id.* at 486. To avoid that escalation of hostilities, the United States renewed treaty negotiations at Canandaigua. *Id.* at 486-87.

Thus, the purposes of the 1794 Treaty of Canandaigua were (1) to reconfirm peace between the United States and the Six Nations, particularly the Senecas, (2) to correct the inadvertent geographical error in boundaries, and (3) to relinquish any rights the United States acquired through that inadvertent error. *Id.* at 487. There was no federal purpose to take property from the State of New York or establish a federal reservation for the Oneidas.

At bottom, the 1794 Treaty of Canandaigua did not set aside an Oneida reservation. Rather, that land was set aside by the State of New York in the 1788 Treaty of Fort Schuyler. As a result, the land on which the Properties are situated was not set aside by the federal government for use by the Oneidas. Therefore, under *Venetie*, the Properties are not Indian country.

### B. The Properties Were Never Under Federal Superintendence

The Properties are not now and never were under federal superintendence, which is an independent reason why they are not Indian country. *Venetie*, 522 U.S. at 533. The Second Circuit essentially rejected that aspect of *Venetie*, and held that there was no requirement of proof that "reservation" land is federally superintended to be Indian country. That error cannot stand.



The level of federal superintendence over Indian land required for Indian country status is that the federal government "actively controls the lands in question, effectively acting as a guardian for the Indians." *Id.* In other words, the land must be "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians." *Id.*

Tested by that standard, the Properties are not federally superintended. The federal government never actively controlled the Properties. The federal government never exercised jurisdiction over the Properties, as guardian and protector of Oneida Indian Nation.[10] The Oneida Indian Nation purchased the Properties in fee simple and has since opened businesses on the acquired land. Services for the Properties are provided by Sherrill and not by the federal government. Moreover, the Properties are not part of the 32 acres of land in Madison County recognized by the Bureau of Indian Affairs as under the jurisdiction of the federal government. In such circumstances, the federal government does not superintend the Properties. *United States v. Roberts*, 185 F.3d 1125, 1130-31 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) (land was under federal superintendence only because the United States retained title to the property; the state considered the property to be beyond its taxing jurisdiction; the BIA Area Director approved the land acquisition; the government oversaw the property; and the BIA treated the property as trust land); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1253 (10th Cir. 2000)(land was under federal

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10 Indeed, the legislative history to 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) indicates that the federal Indian Bureau believed, at the time this act was passed, that the Indians of New York "are in no further need of governmental supervision or control." H.R. REP. NO. 81-2720, at 2 (1949).

superintendence because the BIA treated the land in the same manner as lands within the tribe's formal reservation).

The Second Circuit's conclusion that the Properties are Indian country simply because they are within the historical Oneida Indian reservation is incorrect. The court reached that conclusion by finding that the federal set aside and superintendence requirements are inapplicable where the land in question is a formal reservation. 337 F.3d at 155 ("While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision."). That holding incorrectly (i) presumes the existence of federal set aside; (ii) ignores *Venetie*; (iii) eviscerates the requirements of proof of federal set aside and superintendence for all three prongs of 18 U.S.C. § 1151; and (iv) is based upon the incorrect finding that the federal government established the reservation for the Oneidas in New York State through the 1794 Treaty of Canandaigua. That is a distortion of this Court's precedents and governing treaties.

### C. The Sherrill Properties Are Freely Alienable And Are Not Indian Country Absent Federal Regulatory Approval

There is yet another independent reason why the Properties are not Indian country: the Properties were freely alienable prior to their purchase by the Oneidas, and remain so today. As such, they cannot be vested with Indian country status absent regulatory approval by the federal government. That result flows from Supreme Court precedent and the Indian regulatory scheme.



#### 1. The Properties Are Freely Alienable

The Properties are freely alienable, even if they once were part of the Oneida reservation. The owners of land in the historical Oneida reservation have held fee simple title for most of the last 200 years. The Oneida Indian Nation obtained the Properties in Sherrill in private transactions from non-Indian landowners. The Oneida Indian Nation owns the Properties in Sherrill in fee simple and is free to use them for any purpose, including any non-Indian purpose, also free from any federal government restrictions. That is so because the Properties are not subject to the protections of the Indian Trade and Intercourse Act, 25 U.S.C. § 177.

The 1794 Treaty of Canandaigua expressly permitted the Oneidas and other tribes to sell, and the expressly granted the people of the United States to purchase, the lands referenced in the Treaty: "[S]aid reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." (PA 141; emphasis added). Thus, as a result of both the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua, the sale of the Properties to non-Oneidas was not a violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177.

Moreover, the Second Circuit erred by concluding that the Indian Trade and Intercourse Act applied to the Properties because of the Oneidas' "unextinguished" aboriginal title. 337 F.3d at 146-47, 157-58. As explained above, aboriginal title in Properties terminated – was extinguished – in 1788 as a result of the Treaty of Fort Schuyler. Subsequent sales by the Oneidas of portions of their State-created reservation – in which aboriginal title no longer existed – were not prohibited by the Indian Trade and Intercourse Act. *See Bates v. Clark*, 95 U.S. 204, 208 (1877) ("The simple criterion is that as to all the lands thus described

it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer"); *American Fur Co. v. United States*, 27 U.S. 358, 369 (1829) (the provisions of the Indian Trade and Intercourse Act of 1802 are expressly confined to lands lying within the defined boundary of Indian country).

The Court of Appeals found that New York State did not hold any interest in the reservation established under the 1788 Treaty of Fort Schuyler because, "[a]ny rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution." 337 F.3d at 146. That finding violates the concept of State sovereignty preserved by the Tenth Amendment to the Constitution of the United States to the extent it applies to lands as to which aboriginal title had been extinguished prior to the effectiveness of the federal Constitution.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court explained that "[a]lthough the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Id.* at 713 (*quoting Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71, n.15 (1996)); *accord Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). An important component of State sovereignty is that "a State has plenary powers 'over its own territory. . .'" *Northern Sec. Co. v. United States*, 193 U.S. 197, 347 (1904) (*citing Railroad Co. v. Maryland*, 88 U.S. 456, 473 (1874)); *accord Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 591 (1886).

In 1788, New York State was the sovereign vested with the right of preemption. In the 1788 Treaty of Fort



Schuyler, New York State exercised that right to extinguish aboriginal title and the Oneidas ceded all property rights to the land at issue to the State of New York. These rights were preserved – and not divested – by the federal Constitution. The Constitution did not deprive the State of New York of jurisdiction over its own territory.

As a result, the Properties owned by the Oneida Indian Nation are freely alienable.

2. Indian Country Status Can Only Be Reclaimed By Federal Regulatory Action

As demonstrated above, the Oneida Indian Nation owns the Properties in fee simple and is free to use them for any purpose, including any non-Indian purpose, also free from any federal government restrictions. That land is not Indian country. *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 883-84 (9th Cir. 1999)("The [Navajo land in question] is not [Indian country] because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government"); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993) (United Keetoowah Band of Cherokee Indians' ("UKB") businesses were not located on land set aside by the federal government for purposes of 18 U.S.C. § 1151(b) because title was held by UKB in fee simple and "[n]o action ha[d] been taken by the federal government indicating that it set aside the land for use by the UKB").

The only way that such land can become Indian country, and therefore exempt from taxation, is for the Oneida Indian Nation to petition the Secretary of the Interior

to restore the land to federal trust protection under the Indian Reorganization Act. 25 U.S.C. § 465. This mandatory procedure flows directly from this Court's decision in *Cass County*.

This Court held in *Cass County* that purchase of freely alienable land by an Indian tribe does not make that land Indian country or exempt from state or local taxation. Rather, the "repurchase of [freely alienable] land by an Indian Tribe does not cause the land to resume tax-exempt status . . . unless and until [it is] restored to federal trust protection under § 465." 524 U.S. at 115 (emphasis added).

The decision below ignores the procedural safeguards put in place by the federal government to prevent and minimize the hardships to individuals, cities, counties and states. Under the Indian Reorganization Act, in order for land to be taken into trust by the government, and thus be exempt from taxation, the tribe must file a petition with the Secretary of the Interior (the "Secretary"). 25 U.S.C. § 465.

When filing a petition under § 465, the applicant must provide for the Secretary's consideration, *inter alia*, "[a] description of the effect on the State and its political subdivisions of removing the land from tax rolls," and "[a] description of any jurisdictional and land use infrastructure issues that might arise." 25 C.F.R. § 151.12. Local city, county and state governments are afforded an opportunity to respond to such petitions. Before accepting the land in trust, the federal government is required to weigh the impact of the acquisition on the "State and its political subdivisions resulting from the removal of the land from the tax rolls," as well as the impact of other "jurisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10. Moreover, an application may be approved only if necessary to "[f]acilitate tribal self-determination, economic development, Indian housing, land consolidation or natural



resource protection; and [the Secretary] determine[s] that the acquisition provides meaningful benefits to the Tribe that outweigh any demonstrable harm to the local community." 25 C.F.R. § 151.14. Even if conferring trust status results in benefits to the tribe that outweigh harm to local governments, the Secretary may disapprove an application if it would result in "[s]ignificant harm to the local community." *Id.* These procedures allow Oneida Indian Nation to seek to recreate or reclaim a tribal homeland, while balancing hardships to municipalities and residents in central New York.

For all of the foregoing reasons, the Properties are not Indian country.

## II. THE 1838 TREATY OF BUFFALO CREEK DISESTABLISHED ANY ONEIDA RESERVATION IN NEW YORK

The 1838 Treaty of Buffalo Creek, 7 Stat. 550, required the Oneidas to abandon any lands in the State of New York. The Treaty of Buffalo Creek, subsequent case law, the removal policy of the United States government at the time the treaty was signed and other circumstances all demonstrate that the Oneidas' New York reservation was disestablished as a matter of law.

### A. The Treaty of Buffalo Creek and *New York Indians* Make Plain That No Oneida Reservation In New York Existed After The Treaty

In Article 1 of the Treaty of Buffalo Creek, the Oneidas and other tribes accepted a tract of land in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York . . ." The Oneidas also agreed that the Kansas land was to be their "future home" and "agree[d] to remove to their new homes . . . as soon as they can make satisfactory arrangements with the Governor

of the State of New York for the purchase of their lands at Oneida." *Id.*, Arts. 2, 13. PA 149-50, 155. Congress intended, and the Oneidas agreed, to remove from New York and Wisconsin and move to Kansas permanently.

Equally clear is the fact that the Kansas lands were in exchange for the Oneidas' removal from the eastern lands, including lands in New York. Nowhere in the jurisprudence or commentary is it even suggested that the 1838 Treaty of Buffalo Creek was intended to create a Kansas reservation for the Oneidas in addition to a 300,000-acre parcel – or any parcel – in New York. Such a result would turn then-existing federal Indian policy on its head.

Any doubt that the 1838 Treaty of Buffalo Creek disestablished any Oneida reservation in New York was put to rest by this Court when, in the late nineteenth century, Indian tribes including the Oneidas from New York successfully sued the federal government for the value of the Kansas lands that were set apart for them in the treaty, but later sold by the federal government after the tribes refused to remove to them. *New York Indians v. United States*, 170 U.S. 1 (1898). Holding that the Indians were entitled to the value of the Kansas land, this Court stated:

> While it might be reasonably contended that [the Indians'] failure to remove should result in a cancellation of the [Treaty of Buffalo Creek], and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain.

*Id.* at 19.



Significantly, although the language of this Court's decision was limited to the Wisconsin reservation, the judgment was not so limited. The Oneidas from New York, Wisconsin and Canada all shared in a nearly $2 million recovery flowing from the sale of the Kansas lands. *See id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases"). The Oneidas from New York shared in that recovery because they held title to the Kansas lands granted to them by the 1838 Treaty of Buffalo Creek. That grant was not a gift. Rather, it was made in consideration of the Oneidas' agreement to move from their New York and other eastern homes. The Oneidas sought and received the benefit of the 1838 Treaty of Buffalo Creek, *albeit* not the benefit they initially bargained for. The Court of Appeals, however, permitted the Oneidas to have their cake and eat it too: to undo the bargain, while retaining the benefit, *i.e.*, the proceeds of the civil judgment.

In *Oneida II*, four Justices of this Court, citing *New York Indians* and *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 357-58 (1941), observed – with respect to an issue not resolved by the Court – that whether the Oneidas abandoned their claim to lands in New York when they signed the Treaty of Buffalo Creek was a "serious question." *Oneida II*, 470 U.S. at 269 n.24 (1985) (Stevens, J. dissenting). It is now time to resolve that serious question and hold that the Treaty of Buffalo Creek terminated any Oneida reservation in New York.[11]

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[11] Although two district court decisions have held that the Treaty of Buffalo Creek did not retroactively ratify prior land purchases by the State and extinguish causes of action for violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, these cases did not address the issue of

## B. The Second Circuit Distorted The 1838 Treaty of Buffalo Creek in Numerous Respects

The Second Circuit distorted the 1838 Treaty of Buffalo Creek in numerous respects:

1. The Second Circuit's misinterpretation of the Treaty of Buffalo Creek is grounded in its mistaken belief that the "central bargain" of the treaty was the Indians' exchange of their Wisconsin lands for new lands west of the Mississippi. *Sherrill*, 337 F.3d at 160, 164 (the Wisconsin land exchange was the "rationale for the award" to the New York Oneidas and others in *New York Indians)*. That ignores the language of the Treaty and the *New York Indians* cases. The language of the Treaty required all Oneidas living east of the Mississippi River to remove to Kansas. Treaty, Arts. 1, 2, 13. PA 148-50, 155. Moreover, this Court has explained that the agreement by the Oneidas and others to abandon all eastern lands, rather than the exchange of Wisconsin and Kansas lands, was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Further, the judgment was not limited to lands in Wisconsin; the New York, Wisconsin and Canadian Oneidas all shared in a nearly $2 million recovery. *Id.* at 19; *United States v. New York Indians*, 173 U.S. at 468-69; *New York Indians v. U.S.*, 40 Ct. Cl. at 457-61; *In re Appeal of New York Indians*, 41 Ct. Cl. at 468-72.

2. The Second Circuit also incorrectly viewed Article 13 of the Treaty of Buffalo Creek – the Oneidas' agreement to remove "as soon as" they made satisfactory arrangements

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whether the Buffalo Creek prospectively terminated reservation status. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485, 492-93 (N.D.N.Y. 1990); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 539 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985).



with the governor of the State of New York to sell their remaining lands to the State – as a mere "agreement to agree," conditioned on subsequent land sales to New York State. *Sherrill*, 337 F.3d at 161.[12] On the contrary, this Court in *New York Indians* held that, by virtue of agreeing to remove, the Oneidas obtained an interest in the new lands for which the United States became obliged to pay years later, after it sold the land to non-Indian settlers. *See* 170 U.S. at 26, 36. The fact that Oneidas from New York shared in this award, *see New York Indians v. United States*, 40 Ct. Cl. 448, 467, 471-72 (1905), established that their removal agreement in Buffalo Creek was not simply an "agreement to agree." Indeed, in Article 13, the Oneidas agreed to remove "as soon as" they disposed of their lands, not "only if" they were able to sell them. PA 155. This Court has recently recognized that an agreement to remove "as soon as" an expected imminent event occurs is a present agreement to remove. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189-90 n.4 (1999).

3. The Second Circuit's heavy reliance on a purported statement to the Oneidas by the United States treaty commissioner that the treaty did not require them to remove, *Sherrill*, 337 F.3d at 161-62, is at odds with *New York Indians*. In *New York Indians*, this Court concluded that a treaty proviso adopted by the Senate requiring the explanation of its Buffalo Creek amendments to the New York tribes and each tribe's assent thereto and permitting the President to deduct from the new reservation 320 acres for each Indian who did not remove never became effective

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12 Indeed, elsewhere in its opinion, the Second Circuit recognized that the Oneidas had not merely agreed to agree to remove. 337 F.3d at 165 n.22 (acknowledging that *New York Indians* held that the Oneidas obtained nonforfeitable rights to the Kansas lands "merely by their agreement to remove").

because there was no evidence that the President ever approved the proviso. 170 U.S. at 22-23. The alleged statement cited by the Second Circuit is not annexed to the Treaty as reproduced in Statutes at Large and there is no evidence that it was ever approved by the Senate or the President. *See* 7 Stat. at 562-63 (no qualification of the Oneidas' agreement to remove); Supp. Art., 7 Stat. at 561, 564 (explicitly providing that the United States would not compel the St. Regis Indians to remove).

4. The Second Circuit improperly required the presence of specific cession language to make a finding of reservation disestablishment. 337 F.3d at 158-61. ("[t]here is no specific cession language, and no fixed sum payment for opened land in New York"). A reservation may be diminished despite the absence of specific cession language. *See Hagen v. Utah*, 510 U.S. 399, 403-04 (1994) (finding disestablishment where reservation land was "restored to the public domain" by statute, although the tribe refused to enter a treaty for cession of its land); *see also Solem v. Bartlett*, 465 U.S. 463, 471 (1984) ("explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977). On the contrary, what is required for reservation disestablishment is merely that the "'congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'" *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 444 (1975) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). The express terms of the Treaty of Buffalo Creek, as well as the legislative history and surrounding circumstances, make clear that Congress intended to disestablish any Oneida reservation in New York.

First, Article 2 of the Treaty (PA 149-50) explicitly refers to the Indian Removal Act of 1830, 4 Stat. 411, the



purpose of which was to "[m]ake a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.). The Indian Removal Act's goal of avoiding conflicts of state and tribal sovereignty could be accomplished only if any Oneida sovereignty over the area from which they were obligated to remove was terminated.

Second, the legislative history of other congressional acts supports the view that Congress intended to disestablish the Oneidas' New York reservation. For example, the legislative history of 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) states that the "Oneida . . . Indians have no reservation" in New York State and "are in no further need of governmental supervision or control." H.R. REP. NO. 81-2720, at 2 (1949). Thus, consistent with the 1838 Treaty of Buffalo Creek and the decisions in the *New York Indians* cases, Congress (over one hundred years after the 1838 Treaty of Buffalo Creek was ratified) continued to express the view that the Oneidas' New York reservation was no more.

Third, as explained above, in *New York Indians*, this Court held that title to the Kansas lands passed to the Oneidas at the time the Treaty of Buffalo Creek was made. *New York Indians*, 170 U.S. at 34. Surely, Congress did not intend to pass title to land in Kansas to the Oneidas, while at the same time allowing a 300,000-acre reservation in New York to continue to exist.

Fourth, the circumstances surrounding the Properties mandate a finding that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation. Although the "most probative" evidence of diminishment (or disestablishment) is

statutory language, this Court also considers "the subsequent treatment of the area in question and the pattern of settlement there." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 330 (1998) (citing *Hagen v. Utah*, 510 U.S. 399 (1994)). The City of Sherrill is predominantly populated by non-Indians. In fact, the record below established that only .3% (three-tenths of one percent) of Sherrill's population is American Indian, Eskimo, or Aleut. Furthermore, New York State, and later the City of Sherrill, have exercised jurisdiction over this land from the time of the Properties' transfer from the Oneidas to non-Indians.

Finally, the Second Circuit's observation that the influx of non-Indian settlers into the area is the "least compelling" consideration in the allotment context (337 F.3d at 164) has no force in the context of a removal treaty such as Treaty of Buffalo Creek. Unlike allotment cases – where Indians were expected to remain on their allotted lands in the vicinity of lands that were opened to settlement by others – the premise of the Treaty of Buffalo Creek was that the Oneidas were to leave New York entirely and move to a reservation in Kansas.[13]

5. The Second Circuit's holding that the Treaty of Buffalo Creek did not terminate any Oneida reservation in New York also conflicts with this Court's holding in *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). In *Santa Fe*, the Walapai Indians requested that a new reservation be created for them because of the encroachment of settlers onto their lands. The President created the new reservation by executive order and the Walapais accepted it, although only a few actually moved there. Nevertheless, this Court held that the creation of the new reservation and the tribe's acceptance of it amounted to a relinquishment of tribal claims to lands outside the new reservation. *Santa Fe*, 314 U.S. at 357-58.[14]

This Court's decision in *New York Indians* establishes that the Oneidas accepted a new western reservation in the Treaty of Buffalo Creek. Although only a few Oneidas actually removed, the Oneidas received the benefit of their bargain: they were paid for the new reservation in *New York Indians*. *Santa Fe* establishes that the benefit came with a corresponding burden: the Oneidas' relinquished any alleged tribal jurisdiction over lands in New York.

Therefore, it is beyond legitimate dispute that the 1838 Treaty of Buffalo Creek disestablished any Oneida reservation in New York.

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13 A finding that the Oneida reservation was terminated is not precluded by the fact that a 32-acre parcel in the area is recognized as Oneida land today. If the Oneidas reconstituted as a tribe in New York, the federal government could recognize at that time a federal reservation for those New York Oneidas.

14 The decision below also conflicts with the holdings of the Seventh Circuit in *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 458-59 (7th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999) (hunting and fishing rights reserved in lands that the tribe ceded to the United States in an 1831 treaty were terminated by an 1848 treaty in which the tribe agreed to cede to the United States its remaining Wisconsin lands and remove to Minnesota, although the hunting and fishing rights were not mentioned in the 1848 treaty and the tribe never left Wisconsin); *Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 223-24 (7th Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994)(hunting and other occupancy rights retained by the tribe in land ceded to the United States in an 1842 treaty were extinguished in an 1854 treaty ceding their lands to the United States in exchange for a promise of reservations and annual payments).

## III. INDIAN COUNTRY STATUS CEASES WHEN A TRIBE NO LONGER EXISTS

A final reason why the judgment below must be reversed is that Indian country status ceases when a tribe no longer exists. Indian country includes reservations, dependent communities and allotments of Indian tribes. 18 U.S.C. § 1151. Once an Indian tribe no longer exists, Indian country status for the tribe's land ceases. To restore Indian country status if the tribe or a successor thereafter comes back into existence, an application must be made under the Indian Reorganization Act. The Second Circuit's holding to the contrary improperly expands the scope of Indian country.

The Indian Trade and Intercourse Act, 25 U.S.C. § 177, protects Indian country.[15] The Court of Appeals held that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F.3d at 165. That is illogical, circular and incorrect. Rather, the Oneida Indian Nation has no rights under the Indian Trade and Intercourse Act, 25 U.S.C. § 177, and no claim to historical reservation status for the Properties, unless the Oneida Indian Nation has been in continuous tribal existence since the Properties became subject to the Act. *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*"); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987) (tribe may recover only if it shows that it was in continuous tribal existence and did not abandon tribal status from the time the land was alienated until the time of suit); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 & n.7 (D. Mass. 1978), *aff'd*, 592 F.2d

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15 That is so whether the scope of the Indian Trade and Intercourse Act is limited to Indian country or is broader than Indian country.



575 (1st Cir. 1979).

The fact that Oneida Indian Nation is presently a federally recognized tribe is irrelevant to whether the land it currently owns is Indian country. "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Indian Trade and Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still turn to the district court for an ultimate judicial determination of its claim under the Indian Trade and Intercourse Act." *Id.* at 58.

The Second Circuit's logical fallacy is as follows: If there was a lapse in the Oneida Indian Nation's tribal status, Indian Trade and Intercourse Act coverage and Indian country status both terminate at the moment in time when that lapse begins. No other result is possible: How can land be Indian country if the tribe that previously owned or used it has ceased to exist? How can land be owned by an Indian tribe if the tribe has ceased to exist?

Once Indian country status ends, or once the protection of the Indian Trade and Intercourse Act ceases, the land is then freely alienable, subject to state and local taxation; purchase by the tribe does not create an exemption to taxation unless the lands are restored to trust protection under § 465 of the Indian Reorganization Act. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

As Judge Van Graafeiland observed in dissent below, "authoritative sources" have explained the significance of tribal discontinuity on aboriginal rights.

- "Since original Indian title is dependent upon

proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe constitutes a defense to the aboriginal claim." Felix S. Cohen, *Federal Indian Law*, Ch. 9, Sec. A2a (1982 ed.).

• "The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy . . . The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *United States v. Cook*, 86 U.S. 591, 593 (1873).

• "We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917).

• "To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that ... the trust relationship between the United States and the tribe has not been terminated *or abandoned.*" *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir.1994)(emphasis added).

• "Certainly individual Indians or portions of tribes may choose to give up tribal status.... If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979).



• "By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir. 1932).

337 F.3d at 171-72.

The record below contained substantial evidence that the New York Oneidas ceased to exist for a substantial period of time:

• 1877: "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).

• 1891: "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to

distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* CA 1228-31.

• The 1892 Census Map of New York depicts no Oneida reservation. CA 990-95,1221.

• 1893: "The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." *1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* CA 1228-31.

• 1900: "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." *1900 Annual Reports of the Department of the Interior.* CA 1232-39.

• 1901: "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida



Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections.... At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." *1901 Annual Reports of the Department of the Interior.* CA 1232-39.

• 1906: "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have "squatted" on the Onondaga Reserve: so many of these have intermarried with the Onondaga as to preclude any probability of their removal.... About 120 of them are carried on the agency rolls as "Oneidas at Oneida" which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." *1906 Annual Report of the Department of the Interior.* CA 1240-41.

The non-existence of the New York Oneidas as a tribe persisted into the mid-twentieth century. For example, the record below also showed that in 1925, an Assistant Commission of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. (CA 1250.) Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). (CA 1180-83.) Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

Accordingly, the Second Circuit misinterpreted the scope of the Indian Trade and Intercourse Act, and wrongly affirmed the grant of summary judgment for the Oneida Indian Nation. At the very least, that error should be corrected and the judgment reversed and the case remanded for discovery and trial.

## CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

August 11, 2004

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IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK
*Petitioner,*

v.

ONEIDA INDIAN NATION OF NEW YORK, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## STATEMENT

The City of Sherrill sought to tax tribal land in which the Oneidas have at all times held a tribal possessory right protected by federal laws and treaties, and to enforce the tax by evicting the Oneidas from the land.

New York had caused the transfer of the land out of Oneida possession in 1805 without the approval required by federal law. In *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"), the Court held that a similar illegal conveyance did not extinguish the tribal possessory right or federal protection of the land. After the *Oneida II* decision, the Oneidas regained possession of some of their land through voluntary transactions with willing sellers, including the land at issue here.

Giving effect to the Oneidas' unextinguished possessory right, and the principle that the right cannot be burdened by state and local taxation, the District Court enjoined the City of Sherrill's efforts to evict the Oneidas. Pet. App. 1-60. The Court of Appeals affirmed. Pet. App. 61-133.

### A. Federal Protection of Oneida Lands

During the Revolution, the Oneidas allied with the new nation and shared in its victory. *See Oneida II*, 470 U.S. at 230-32; Treaty with the Oneida, 7 Stat. 47 (Dec. 2, 1794) (describing Oneida war sacrifices).

At the war's end, the Continental Congress confirmed the Oneidas' possession of their aboriginal lands, including the land at issue here. 25 J. Cont'l Cong. 681, 687 (Oct. 15, 1783). A year later, the United States made the Treaty of Ft. Stanwix. Article II provided: "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled." Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784).

On September 22, 1788, New York purported to purchase millions of acres of aboriginal Oneida land through the Treaty of Ft. Schuyler. The first article provided that "[t]he Oneidas do cede and grant all their lands to the people of the State of New York forever." The second article, however, qualified the cession: "Of the said ceded lands," the second article "reserved" aboriginal land for the Oneidas to "hold to themselves and their posterity forever for their own use and cultivation." Pet. App. 136-37. "The Oneidas retained a reservation of about 300,000 acres," *Oneida II*, 470 U.S. at 231, which included the land at issue here.

Thereafter, the United States made the Treaty of Ft. Harmar. Treaty with the Six Nations, 7 Stat. 33 (Jan. 9, 1789). Article 3 stated: "The Oneida * * * are also again secured and confirmed in the possession of their respective lands." Next, in 1794, the United States and the Six Nations entered into the Treaty of Canandaigua. 7 Stat. 44 (Nov. 11, 1794). Articles 2 and 4 protected the Oneida reservation:

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them; in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.
>
> * * *
>
> The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.



Pet. App. 141, 142-43. Article 6 provided for the payment of annuities and the appointment of a federal superintendent, and Article 7 provided for resolution of future disputes by federal officials. *Id.* 143-44.

### B. Federal Protection of Tribal Lands Generally

"With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida II*, 470 U.S. at 234; *see also United States v. Lara*, 124 S. Ct. 1628, 1633 (2004). In 1790, Congress enacted the first Nonintercourse Act, prohibiting "the conveyance of Indian land except where such conveyances were entered pursuant to the treaty power of the United States." *Oneida II*, 470 U.S. at 231-32. Congress enacted a "stronger, more detailed version of the Act" in 1793. *Id.* at 232. The Act was reenacted in substantially identical form in 1796, 1799, 1802, and 1834. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 668 n.4 (1974) ("*Oneida I*"); *see* 25 U.S.C. § 177 (current version). The version applicable at the time of the 1805 conveyance at issue here provided: "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution." Act of March 30, 1802, 2 Stat. 139, 143.

### C. Illegal Conveyance of Oneida Lands

In 1795, New York purchased about one-third of the Oneida reservation without federal approval. It did so despite the warning of the United States Secretary of War. *Oneida II*, 470 U.S. at 232-33.

For a brief time thereafter, New York sought to comply with federal law, requesting the appointment of federal commissioners for several treaties with tribes in New York, including for 1798 and 1802 land purchases from the Oneidas. *See Oneida II*, 470 U.S. at 246-47 & nn.19-20; F.P. Prucha, American Indian Treaties: The History of a Political Anomaly 115 (1994). After 1802, New York no longer sought the required federal approvals when dealing with the Oneidas. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 535 (N.D.N.Y. 1977).

In 1805, New York arranged an indenture that conveyed a tract of 100 acres (including the land at issue here) to an Oneida member. In 1807, New York authorized conveyance of the 100 acres to a non-Indian. N.Y. Assembly, Report of the Special Committee Appointed by the Assembly of 1888 to Investigate the "Indian Problem" of the State of New York, No. 51, at 259-63 (Feb. 1, 1889) ("Whipple"); CAJA 359-61, 374, 412-13 & 414. Through these and other illegal transfers from within the 300,000-acre reservation acknowledged in the Treaty of Canandaigua, the amount of land in Oneida possession shrank to about 5,000 acres by 1838. Letter from R.H. Gillet to C.A. Harris (Dec. 27, 1837), *in* S. Exec. Doc. No. Confidential 10E, 25th Cong., 2d Sess., at 35 (1838).

### D. The Treaty of Buffalo Creek

In 1838, the United States negotiated the Treaty of Buffalo Creek with "the New York Indians." 7 Stat. 550 (Jan. 15, 1838). The New York Indians had rights in Wisconsin land by virtue of an earlier federally-approved purchase. Treaty with the Menominee, 7 Stat. 342 (Feb. 8, 1831); 7 Stat. 346 (Feb. 17, 1831); 7 Stat. 405 (Oct. 27, 1832). Article 1 of the Treaty of Buffalo Creek contained a cession by the New York Indians of all Wisconsin lands other than 50,000 acres, which were reserved. Pet. App. 148-49. Article 2 provided, "[i]n consideration of the above cession and relinquishment," that the United States would set apart land in Kansas for the



tribes. *Id.* 149-50. The only land in New York ceded by the treaty was not Oneida land, but Seneca and Tuscarora land, addressed in articles 10 and 14. *Id.* 153-54, 155-56.

Article 13 provided for payment to certain Oneidas "for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof" and that "they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida," thus leaving removal to the future satisfaction of the Oneidas. *Id.* 155.

Article 3 confirmed that removal was left optional; it provided for forfeiture of Kansas land of tribes that did not remove. *Id.* 150. The same article left the President with discretion to decide when, if ever, removal would occur. Article 15 authorized payments "from time to time under the direction of the President * * * in such proportions" as needed, depending on the number of Indians who chose to move to Kansas. *Id.* 157.

The Senate amended the treaty on June 11, 1838, providing that it "shall have no force or effect whatever" until "submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto." S. Exec. J. 130 (June 11, 1838).

The federal commissioner who had negotiated the treaty, Ransom H. Gillet, returned to New York, where, on August 9, 1838, he gave a document to the Oneidas promising that they "will not be compelled to sell or remove." Gillet also promised "that the treaty was not, & is not intended to compel the Oneidas to remove." Resp. App. 10-11.

On October 25, 1838, Gillet reported to the Commissioner of Indian Affairs that he had explained the treaty to the Oneidas as "necessary to enable them fully to understand

every thing." He noted that "[s]ome of the tribe expressed their fears that they might be compelled to remove, even without selling their land to the State, and desired some evidence from me that such would not be the construction of the papers." On receipt of Gillet's "assurance," "a large number signed the written assent." Resp. App. 6-7.

### E. Federal Decision to Keep Tribes in New York and to Sell the Kansas Land

Removal to Kansas did not occur. The federal government decided not to promote or pay for removal. The President eliminated the removal option by restoring the Kansas lands to the public domain and selling them.

As summarized in an 1883 report by the Commissioner of Indian Affairs (H.R. Rep. No. 2001, 47th Cong., 2d Sess. (1883)): "There appeared to be no desire on the part of any considerable number of the Indians to remove, and the idea of the removal of small parties was discouraged by the department." JA 167, 163-71; *see* N.Y. Sen. Rep. No. 70, at 4 (Mar. 24, 1847) (federal commissioner told New York Indians in 1846 that "if it was their preference to remain at their present settlements, they were at full liberty to do so, and would here be protected in all their rights").

There was one effort to remove a few New York Indians, which the United States tried to stop, and it was a disaster. *See* JA 168-69 (many "died, and most of the survivors ultimately returned to New York"); Annual Report of the Commissioner of Indians Affairs 231-235 (1846) (same); S. Exec. Doc. C, 38th Cong., 1st Sess., at 1-2 (1863) (some had "to flee to save their lives, others having been murdered upon their premises"). "No further effort at removal appears to have been made * * *." JA 168; *see also id.* 184 (Court of Claims finding XV).

The United States abandoned even voluntary removal when the President proclaimed the sale of the Kansas lands.



*New York Indians v. United States*, 170 U.S. 1, 35 (1898) ("*New York Indians II*") (regarding Proclamation No. 667 (Aug. 21, 1860)); *see also New York Indians v. United States*, 30 Ct. Cl. 413, 448-51 (1895) (detailing federal decision not to remove).

In response to the New York Indians' 1883 petition, which was signed by four Oneida chiefs, JA 147-51, Congress authorized the Court of Claims to find facts regarding the Kansas lands. S. Rep. No. 910, 52d Cong., 1st Sess. (1892); JA 172-89. This Court thereafter held the New York Indians entitled to damages for the value of the Kansas lands promised in exchange for the cession of Wisconsin lands, which could not be restored. *New York Indians II*, *supra*.

### F. The Oneidas After the Treaty of Buffalo Creek

The Oneida land remaining in tribal possession decreased as New York purchased it. Whipple, at 329-59. In 1843, New York purported to convey tribal land to individual members in severalty. Act of April 10, 1843, ch. 87, 1843 N.Y. Laws 62. Nevertheless, some of the lands remained in tribal possession. Maps prepared for the Commissioner of Indian Affairs from 1883 to 1917 consistently depict an Oneida reservation in New York.

The trust relationship between the United States and the Oneidas continued. The Oneidas received annuities in the form of cloth pursuant to the 1794 Treaty of Canandaigua. Annual Reports of the Commissioner of Indian Affairs, 1864, 1865, 1866, 1868, 1880, 1892-1901; *Oneida Indian Nation*, 434 F. Supp. at 538. Throughout the time that Sherrill treats as critical, the Annual Reports of the Commissioner of Indian Affairs consistently counted Oneidas living on the Oneida "reservation" or "reserve" among the tribes under the jurisdiction of the Bureau of Indian Affairs' New York agency. Annual Reports of the Commissioner of Indian Affairs, 1870-1920.

In the early twentieth century, the Oneidas' rights were confirmed when a state court mortgage foreclosure threatened thirty-two acres of the land remaining in tribal possession. The Attorney General of New York notified the court that the Oneidas "constitute, in fact, a band, with chiefs or head men, who speak for them, and claim tribal rights" and that the land in question was non-taxable tribal land. Resp. App. 12-24. After the court ordered eviction, without addressing the Attorney General's notice (*Boylan v. George*, 117 N.Y.S. 573 (N.Y. App. Div. 1909)), the United States filed a federal suit as trustee for the Oneidas. The District Court held that the Oneidas continued their tribal existence and that the Oneida lands were reservation lands, restoring them to Oneida possession. *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919). The Second Circuit affirmed, holding that "the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward" and that New York could not "extinguish the right of occupancy which belongs to the Indians." *United States v. Boylan*, 265 F. 165, 174 (2d Cir. 1920), *dism'd for want of jurisdiction*, 257 U.S. 614 (1921).

In 1936, the United States invited the Oneidas to vote on reorganization under the Indian Reorganization Act, which the Oneidas did, voting to keep a traditional form of tribal government and to reject a written constitution. 1936 Annual Report of the Commissioner of Indian Affairs, at 163.

In 1979, the Secretary of the Interior published the first list of federally recognized tribes, which included the Oneida Indian Nation of New York. 44 Fed. Reg. 7325, 7326 (Jan. 31, 1979); *see also* 68 Fed. Reg. 68180, 68182 (Dec. 5, 2003) (current list). The Department of the Interior also recognizes the Oneida Indian Nation of New York as holding rights to Oneida land under the Treaty of Canandaigua. JA 207-08.



## SUMMARY OF ARGUMENT

I. The legal principles that govern this case have long been settled. Immunity from state and local taxation attaches to land in which an Indian tribe has a right of possession that is federally protected, whether because the aboriginal right of possession has never been extinguished or because a federal treaty protects the possessory right to the land as a "reservation" (or both). *E.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-65 (1985); *Oneida I*, 414 U.S. at 672; *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172, 174-75 (1973); *New York Indians*, 72 U.S. 761, 771 (1866) ("*New York Indians I*"). The possessory right and consequent tax immunity, moreover, cannot be extinguished without clear *federal government* action—in the absence of which they persist despite illegal state-sponsored dispossession of an Indian tribe even for long periods of time, as *Oneida II* ruled with respect to the Oneidas' possessory right. *See also Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

These venerable principles, which are essential to the federal government's fulfillment of its responsibility to protect Indian tribes, were not disturbed by this Court's decisions in *Cass County v. Leech Lake Band*, 524 U.S. 103 (1998), and *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). Both decisions involved land as to which Congress had clearly removed federal protection of tribal possessory status; new congressional authorization was required—but absent—to recreate such status; an Indian Tribe could not create it on its own by purchasing the land. Those decisions do not require new congressional action to protect land that has never lost its federal protection in the first place. Nor did Congress' creation in 1934 of a mechanism for creating new federally protected tribal lands, 25 U.S.C. § 465, effect an implied repeal of preexisting, otherwise-persisting federal legal protections for tribal land.

The only question, accordingly, is whether the lands at issue here—which undisputedly are within the Oneida Nation's aboriginal lands and the subject of federal treaties—validly lost their protected status. Sherrill urges that such loss occurred at three times—in 1788, through the New York Treaty of Ft. Schuyler; in 1838, through the federal Treaty of Buffalo Creek; and at some indistinct time near 1890, through some lapse in tribal government activity. These three arguments are legally insupportable.

II. The 1788 Ft. Schuyler Treaty did not abrogate the Oneida Nation's right of possession in the land at issue: before and after the treaty the Nation had its right of possession and consequent tax immunity. The treaty specifically "reserved" this land from the "cession" the Oneidas made to New York—language that must be read as protecting, not eliminating, the Nation's possessory right, which, indeed, the State respected in its conduct immediately following the treaty (recognizing tax immunity, for example). In any event, the national government was fully empowered to do what it unmistakably did in the 1794 Treaty of Canandaigua: acknowledge formal federal treaty protection to this land as a federal reservation. That protection, as well as the Nonintercourse Act, rendered illegal the post-1794 dispossession of much of the Nation's land by New York (without valid federal approval), regardless of any disputes about characterizations of the 1788 state treaty.

III. The Nation did not lose its possessory rights through the 1838 Treaty of Buffalo Creek. That treaty by its terms did not require the Nation to leave its land in New York, let alone cede or terminate any preexisting rights, or ratify earlier illegal transactions, in such land. It left removal from New York (for the promised Kansas lands) to the future voluntary decision of the Nation's members, who did not make that choice, and to the discretion of the executive branch, which changed its mind about even voluntary removal, chose not to



pay for it, told the Indians not to go, and sold the Kansas lands, ending the removal option. The formal negotiating history also establishes that mandatory removal was not within the parties' understanding of what they were doing in this bilateral agreement (whose interpretation is not simply a matter of congressional intent) because the federal commissioner specifically told the Nation that removal was not mandatory. He did so because the Oneidas would not agree to the treaty otherwise.

Post-1838 facts prove that the Nation did not give up its possessory rights through the Treaty of Buffalo Creek. In particular, when members of the Nation recovered money in *New York Indians II* for the federal government's sale of the Kansas lands, they did not thereby confirm that the Kansas lands was a swap for relinquishing rights in New York land. The New York tribes, rather, had land in Wisconsin that they gave up in the Treaty, and this Court confirmed in *New York Indians II* that the New York tribes got damages because they could no longer get back the Wisconsin lands; the damages, and the consideration for the Kansas lands, had nothing to do with New York lands.

IV. Finally, the Nation did not lose its federally protected possessory rights through some "lapse" in tribal status (Pet. Br. 41) near the end of the nineteenth century. This asserted basis for loss of rights does not even purport to invoke the formal federal government action (whether through bilateral agreement or unilateral imposition) that is required to extinguish tribal possessory rights. Here, the political branches of the federal government officially recognize the Nation's status and its entitlement to those rights, and the trust relationship between the United States and the tribe has never been abandoned or terminated. Those facts make any judicial inquiry into *de facto* "lapse" legally immaterial. *See, e.g.*, *United States v. John*, 437 U.S. 634, 652-53 (1978); *Winton v. Amos*, 255 U.S. 373, 378-79 (1921).

In any event, such an inquiry would present no triable issue in this case. On tribal continuity, Sherrill's evidence consists of isolated snippets of unelaborated assertions. Against those snippets is a massive array of contrary evidence, including contemporaneous, consistent governmental acknowledgments of the continued status of the Nation, and the tribal-status-affirming result of a full trial conducted at a time when witnesses who directly knew the facts could and did testify. *United States v. Boylan*. On this wholly lopsided evidence, the District Court that granted summary judgment, were it instead to act as trier of fact, could not make a reasonable contrary finding of any legally significant tribal discontinuity.

## ARGUMENT

### I. ONEIDA LAND SUBJECT TO UNEXTINGUISHED TRIBAL POSSESSORY RIGHTS CANNOT BE REMOVED FROM ONEIDA POSSESSION THROUGH A STATE LAW PROPERTY TAX FORECLOSURE.

Tax immunity accompanies a federally protected tribal possessory right never extinguished by the federal government. *Oneida II* specifically established that the Oneidas' tribal possessory right persists despite illegal transfer of tribal lands two centuries ago and despite the continued dispossession of the Oneidas. The Oneidas are therefore entitled to the tax immunity accompanying that right because, as shown in Points II-IV, *infra*, that right has never been extinguished.

#### A. States May Not Tax Land in Which a Tribe Holds an Unextinguished Possessory Right Deriving from Indian Title or Federal Treaty Protection.

In its aboriginal lands, a tribe has a possessory right—a right to occupy and use the lands—referred to variously as Indian title, aboriginal title and original title. *Oneida II*, 470 U.S. at 230; *Oneida I*, 414 U.S. at 667; *New York Indians I*,



72 U.S. at 771. That Indian title persisted through European discovery, after which the separate fee title was held, first, by the discovering European sovereign and, thereafter, by individual states or the United States. *Oneida II*, 470 U.S. at 234-35; *Oneida I*, 414 U.S. at 667. In New York and the other original states, the fee title passed from the British Crown to the state, *Oneida I*, 414 U.S. at 670, but the fee title was always burdened by Indian title, the tribal possessory right, *Oneida II*, 470 U.S. at 234; *Oneida I*, 414 U.S. at 667; *see United States v. Thomas*, 151 U.S. 577, 584 (1894) (holder of "naked" fee title cannot disturb Indian possession). The tribal possessory right is "as sacred as the fee simple of the whites." *Oneida I*, 414 U.S. at 668-69 (citations omitted).

Federal treaties, such as the Treaty of Canandaigua, add an additional, independent foundation for tribal possessory rights. *See Oneida II*, 470 U.S. at 231 (describing Oneida treaties that "secure" the Oneidas' possession of land and guarantee "free use and enjoyment"); *see also Oneida I*, 414 U.S. at 667, 670 (federal treaties recognized tribal occupancy rights in specific land). That right, like the aboriginal title, makes land a reservation and hence Indian country. 25 U.S.C. § 1151.[1]

State and local governments may not tax tribe-possessed lands in which the tribal possessory right, whether aboriginal

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[1] Federal treaties establish the Oneida reservation as a "reservation under the jurisdiction of the United States," as required for Indian country status under 25 U.S.C. § 1151. "[I]t cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the [Indians] and the exclusion of non-[Indians] from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the [Indians] under general federal supervision." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174-75 (1973); *see Alaska v. Native Village of Venetie*, 522 U.S. 520, 528 n.3 (1998) ("We had also held, not surprisingly, that Indian reservations were Indian Country."); *Donnelly v. United States*, 228 U.S. 243, 269 (1913) (reservations are Indian country); *United States v. Pelican*, 232 U.S. 442, 445, 449 (1914) (same).

or treaty-based or both, is unextinguished. State taxation is "inconsistent with the original title of the Indians." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-65 (1985) (citation omitted). It also is inconsistent with federal treaties that "define the boundaries of federal and state jurisdiction" by identifying lands "for the use and occupation of" a tribe. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 n.8, 174-75 (1973); *see also Oneida I*, 414 U.S at 672 (state taxation "interfere[s] with Indian possessory rights guaranteed by the Federal Government"). "State and local governments may not tax Indian reservation land." *Cass County v. Leech Lake Band*, 524 U.S. 103, 110 (1998); *see Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Kansas Indians*, 72 U.S. 737, 756 (1866); *New York Indians I*, 72 U.S at 771 (treating Senecas' Treaty of Canandaigua reservations as "wholly exempt from State taxation").

Tribal immunity from state taxation is so fundamental that the Constitution refers to "Indians not taxed." U.S. Const. Art. I, § 2; Amend. XIV, § 2; *see Elk v. Wilkins*, 112 U.S. 94, 99 (1884); F. Cohen, Handbook of Federal Indian Law 389 (1982 ed.). This immunity is not balanced against other interests. "In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" against state taxation of tribes and their reservations. *California v. Cabazon Band*, 480 U.S. 202, 215 n.17 (1987); *see also Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976) (permitting state regulation and taxation of tribes could "result in the undermining of * * * tribal governments").

### B. The Tribal Possessory Right Persists Unless Extinguished in Compliance with Federal Law, Even if Possession Is Interrupted for a Long Time as a Result of Land Transfers that Violated Federal Law.

Although New York and the other original states holding fee title have the sole, "pre-emptive right to purchase from



the Indians," *Oneida I*, 414 U.S. at 670, the states cannot purchase Indian title and extinguish the tribal possessory right without federal consent. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." *Id.* The holder of the preemption right can act only "with the consent of the government." *New York Indians I*, 72 U.S. at 771. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law," *Oneida II*, 470 U.S. at 234, and, since 1790, the Nonintercourse Act has prohibited conveyances of Indian title "except where such conveyances were entered pursuant to the treaty power of the United States." *Id.* at 231-32. The federal role also exists because federal treaties "protect[] Indian occupancy," *Oneida I*, 414 U.S. at 670, and reservations can be modified only by Congress, *e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

In *Oneida II*, the Court gave these principles specific effect with respect to Oneida land conveyed to New York in 1795 without the required federal approval. The Oneidas asserted a continuing trespass on their continuing possessory right and sought rental damages for 1968 and 1969 against the two counties that had acquired some of the land. *Oneida II*, 470 U.S. at 229. The District Court found the counties liable to the Oneidas "for wrongful possession of their lands" and ultimately entered judgment awarding damages equal to the "rental value" of the land in 1968 and 1969. *Id.* at 230. The Court of Appeals affirmed in part, remanding only for a recalculation of the rental damages for the those two years. *Id.* This Court "affirmed with respect to the finding of liability under federal common law." *Id.* at 253.

The affirmance of the judgment imposing liability for damages for trespass in 1968 and 1969 necessarily confirmed, on the record in that case, the enduring Oneida possessory right and federal protection against alienation of it. The Court affirmed the Oneidas' cause of action "for violation of their

possessory rights." *Id.* at 236. The Court reiterated the rule, codified in the Nonintercourse Act, that the sovereign's consent "was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*." *Id.* at 245. The Court held that a tribal possessory right persists despite illegal conveyance, ruling that post-1795 treaties involving other Oneida land did not reflect "congressional intent to extinguish Indian title" to the Oneida land transferred in 1795. *Id.* at 247-48; *see also Oneida I*, 414 U.S. at 667, 670, 674.

The Court recognized the impact of its decision, noting that it granted review because of the importance of the case for the Oneidas and "potentially for many eastern Indian land claims." *Oneida II*, 470 U.S. at 230. In the conclusion of its decision, the Court referred to the amicus brief of the United States and remarked that "[t]he Government recognized, as we do, the potential consequence of affirmance." *Id.* at 253. It is up to Congress to address any problems that cannot be resolved in the usual cooperative manner. *See id.*; *see also* note 4, *infra*.

### C. A Clear Federal Treaty or Statute Is Required to Extinguish the Tribal Possessory Right and Accompanying Tax Immunity.

A federally protected tribal possessory right can be extinguished only by a clear federal statute or treaty. *Oneida II*, 470 U.S. at 248, and the same is true of the accompanying tax immunity. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985). As to the Oneidas, Congress has not extinguished either. *Cf.* 25 U.S.C. § 233 (New York may not tax reservations lands). Thus, the federally protected possessory right that barred New York from transferring Oneida land even in voluntary transactions also bars New York and its political subdivisions from taking Oneida land from the Oneidas today through tax foreclosures and evictions.



The 1998 decisions in *Cass County v. Leech Lake Band*, 524 U.S. 103 (1998), and *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), did not alter the bedrock requirement of affirmative federal extinguishment of federal protection. Those decisions merely forbid tribal efforts to create, on their own, federal protection of land that Congress has declared unprotected. They do not demand new federal government action to protect a possessory right that has never lost federal protection in the first place.

In *Venetie*, a federal statute revoked an Indian reservation in Alaska. Congress transferred the land to Native corporations, and they transferred the land in fee simple to an Indian tribe. The Court held that the tribe's acquisition of title to, and its presence on, the land did not convert a terminated reservation into a "dependent Indian community" subject to tribal power to tax non-Indian contractors working there. In effect, the Court held that the tribe could not itself undo what Congress had done, by restoring the federal protection Congress had eliminated.[2]

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[2] *Venetie* did not superimpose an "active control" requirement on reservation land, so that some reservations no longer qualify as Indian country. See note 1, *supra*. Nor did *Venetie* change the rule that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973) (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)). And *Venetie* did not change the rule that tribal possessory rights persist until the United States acts unambiguously to alter them. *Oneida II*, 470 U.S. at 248; *see also Bates v. Clark*, 95 U.S 204, 209 (1877) (land is Indian country "so long as the Indians retain their original title to the soil").

In any event, there is ample evidence of federal involvement with respect to the Oneidas and their lands. The national government guaranteed possession in 1784, 1789 and 1794 treaties, the last providing for a federal superintendent and for federal dispute resolution. Today, the Bureau of Indian Affairs approves requests to encumber Nation land restricted against alienation. *E.g.*, JA 229-36. Sherrill itself has sought the Secretary of the Interior's approval in connection with an easement on Oneida

In *Cass County*, an Indian tribe purchased land from non-Indians within the boundaries of the tribe's reservation in Minnesota. The land was covered by a federal statute that had specifically removed federal protection, *i.e.*, restrictions against alienation, of the land. The Court held that Congress had removed the tribe's tax immunity in the land when it removed restrictions on alienability. Tribal action could not reverse that decision.

The point of *Venetie* and *Cass County* is that Indian tribes themselves cannot generate new federally-protected rights simply by acquiring possession of lands in which Congress has terminated their old rights. Neither decision suggests that original and continuing federal protection of tribal possessory rights will not be enforced because of earlier illegal transfers.

Like *Venetie* and *Cass County*, the statute authorizing new federal protection for land when the federal government takes it into trust for a tribe, 25 U.S.C. § 465, supplies no basis for abrogating preexisting, well-established federal protections. Congress, in creating this authority in 1934, did not effect an implied repeal of the preexisting federal rights of tribes in their land or change the legal consequence of those rights, including tax immunity. That process, of course, is required for land that, as in *Venetie* and *Cass County*, does not otherwise have federal protection, but it is not required for land that is already subject to federal protection that has not been removed.[3]

Refusing tax immunity to land that the Oneidas have brought back into their possession, and in which the tribal possessory right has never been extinguished, would amount

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lands. JA 212-15; *see also* 64 Fed. Reg. 67293 (Dec. 1, 1999) (Oneida ordinance); 59 Fed. Reg. 2629 (Jan. 18, 1994) (Oneida ordinance); 58 Fed. Reg. 33760 (June 5, 1993) (Oneida compact).

[3] The Oneidas have not sold any reacquired lands, which remain subject to pre-existing restraints on alienation.



to extinguishment that Congress has not authorized. In *Oneida II*, the Court left open whether "equitable considerations" might limit ejectment as a remedy with respect to land that is not in the Oneidas' possession. 470 U.S. at 253 n.27. The issue here is not remedy for dispossession, but protection of actual possession accompanied by an unextinguished federally protected possessory right. *Cf. Cayuga Indian Nation v. Cuomo*, 1999 WL 509442, *23-24 (N.D.N.Y. July 1, 1999) ("By using monetary damages to purchase property from willing sellers, the Cayugas should have no difficulty accomplishing the same goals which they hope to accomplish through ejectment.").[4]

Thus, the only relevant question in this case is whether the Oneida possessory right was ever lawfully extinguished, and, as we now show, it was not.

## II. THE ONEIDAS' POSSESSORY RIGHT WAS PROTECTED AT THE TIME OF THE 1805 DISPOSSESSION.

The land at issue is part of the Nation's aboriginal lands. The Nation did not lose its aboriginal possessory rights (or

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[4] Giving meaning to the possessory right when the Oneidas have possession does not affect lands not in Oneida possession. Decisions like *Montana v. United States*, 450 U.S. 544 (1981), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), curtail tribal jurisdiction with respect to land not in tribal possession—and the Oneidas do not claim it. Further, 25 U.S.C. §§ 232 and 233 give New York civil and criminal adjudicatory jurisdiction with respect to most claims and offenses arising on Indian reservations in New York. Sustaining the Nation's tax immunity will not have dire effects. *See* Br. of National Congress of American Indians. As to land that is in Oneida possession, the District Court found that Sherrill exaggerates its claims of injury arising from inability to tax those lands. Pet. App. 106-08. The Oneidas make large payments to and enter into service agreements with local governments. JA 265. Sherrill refuses both. That refusal is not typical of local governments. *See* Br. of Puyallup Tribe *et al.* (explaining how tribes and local governments resolve financial issues through service agreements and other means).

tax immunity) in the 1788 state Treaty of Ft. Schuyler. The Nation had possession and immunity before and after. The Nation's rights were protected by the 1790 federal Non-intercourse Act and, in any event, established by the 1794 federal Treaty of Canandaigua, and by earlier federal treaties. In fact, the 1794 treaty by itself proves federal protection before the 1805 dispossession of the land at issue, for the Oneidas' rights under that treaty are no less than the possessory rights and tax immunity of the Senecas specifically affirmed in *New York Indians I*. *See* 72 U.S. at 768 (in the Treaty of Canandaigua, "the United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment"); Pet. App. 141-43. The 1788 state Treaty of Ft. Schuyler certainly did not preclude federal protection of the land by federal treaty and federal statute.[5]

### A. The 1788 State Treaty Did Not Extinguish Oneida Rights in the Reserved Lands.

Article 1 of the treaty provides that the Oneidas "cede and grant all their lands to the people of the State of New York forever." (Pet. App. 136), but article 2 immediately qualifies that cession: "[o]f the said ceded lands" a tract described by metes and bounds is "reserved" to the Oneidas to "hold to themselves and their posterity forever for their own use and cultivation." Pet. App. 137. That is the language of reservation, not retrocession. The two articles together delineated the boundary between the lands ceded to the state and the lands reserved by the tribe. In the latter, the Oneidas retained the right of perpetual possession.

[5] The argument that New York extinguished Oneida possessory rights in 1788 was hardly obvious through three decades of litigation. In *Oneida I* and *Oneida II*, the State and the Counties defended against the assertion of a tribal possessory right but never thought to say it had been extinguished in 1788. Sherrill never made the point until it filed a Fed. R. App. P. 28(j) letter after argument in the Court of Appeals.



It is well-established that such language of cession and reservation does not affect the tribal right to possess the reserved lands. Indeed, in 1795, United States Attorney General Bradford concluded that the 1788 treaty gave only the "right of preemption" to New York as to the reserved lands, with the Oneidas retaining their possessory rights, which could only be extinguished "by a treaty holden under the authority of the United States, and in the manner prescribed by the law of Congress." Resp. App. 2-3 (adding that "they are still the lands of those [Indian] nations").

In 1833, United States Attorney General Taney construed language similar to the 1788 treaty ("From the cession aforesaid, the following tracts shall be reserved") as leaving Indian title to the reserved land undisturbed:

> I have the honor to state that, in my opinion, the original Indian title in these reservations was not extinguished on the ratification of the treaty. It ceded, by the first article, a certain tract of country to the United States, and, by the second article, reserved from the cession large quantities of land in favor of certain Indians named. These reservations are excepted out of the grant made by the treaty, and did not therefore pass by it: consequently, the title remains as it was before the treaty; that is to say, the lands reserved are still held by the original Indian title.

Title to the Pottawatomie Reservations, 2 Op. Att'y Gen. 587 (1833) (treaty at 7 Stat. 378 (1832)); *see also Kansas Indians*, 72 U.S. at 755 (holding Shawnee land immune from state taxes under 1854 treaty, 10 Stat. 1053, notwithstanding cession of all land to the United States in article 1 and explicit cession back to the Shawnee in article 2).

In *United States v. Winans*, 198 U.S. 371, 377 (1905), the Court held that a tribe reserved fishing rights in a treaty that, in article I, did "cede, relinquish, and convey to the United States all [tribal] right, title and interest in and to" certain lands but, in article III, "secured" to the tribe "the right of

taking fish at all usual and accustomed places" on the ceded lands. "[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted." *Id.*; *see Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979) ("securing" rights is synonymous with reserving rights).

In *United States v. Klamath & Moadoc Indians*, 304 U.S. 119 (1938), the Court similarly construed a treaty that stipulated that the "Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them." Treaty with the Klamath, 16 Stat. 707 (Oct. 14, 1864). Article 1 added: "*Provided*, That the following-described tract, within the country ceded by this treaty be set apart as a residence for said Indians [and] held and regarded as an Indian reservation." *Id.* The Court read the language as ceding only "a part" of the tribal lands, with the tract subject to the proviso continuing as "part of the reservation retained by plaintiffs out of the country held by them in immemorial possession." *Klamath*, 304 U.S. at 122. That the land was retained by a proviso "clearly did not detract from the tribes' right of occupancy." *Id.* at 123.

*Winans* and *Klamath* exemplify the Court's frequent rejection of technical arguments that would diminish the value of a treaty right held by a tribe. *E.g.*, *Seufert Bros. v. United States*, 249 U.S. 194, 198 (1919); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Minnesota v. Hitchcock*, 185 U.S. 373, 396-97 (1902). Indian treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *accord Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

The Court (per Marshall, C.J.) applied the same principle in *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832), holding



that a treaty detailing the "[t]he boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States" did not effect an implied surrender of tribal rights followed by a grant of lesser rights. "It could not * * * be supposed, that any intention existed of restricting the full use of the lands they reserved." *Id.* at 553.

> Is it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out." *The actual subject of contract was the dividing line between the two nations;* and their attention may very well be supposed to have been confined to that subject. When, in fact, they are ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they did not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used.

*Id.* at 552-53 (emphasis added); *see also id.* at 563, 582 (M'Lean, J., concurring).[6]

The negotiating history of the 1788 treaty confirms that the Oneidas gave up no possessory rights in the reserved lands. The Oneidas previously had leased all their lands to a private land company "excepting and reserving" the same lands later reserved under the 1788 treaty. 1 Franklin B. Hough, Pro-

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[6] The same analysis applies to the 1788 state treaty. Under the Articles of Confederation, the state had power to extinguish Indian title, if at all, only by purchase with tribal consent. *See* p. 25 & n.9, *infra*. Thus, the tribe's understanding controls, as a matter of federal law, the meaning and extent of cession in a state treaty.

ceedings of the Commissioners of Indian Affairs Appointed by Law for the Extinguishment of Indian Title in the State of New York, at 123 (1861). After New York invalidated the lease, it sought to acquire the same lands, with the previously-reserved lands again to be reserved. There is no evidence that the State asked the Oneidas, or that the Oneidas intended, to give up rights in the reserved lands, which included the Oneidas' homes and prime fishing areas. *Id.* at 232-33.

The 1823 decision in *Goodell v. Jackson*, 1823 N.Y. LEXIS 36 (N.Y. Sup. Ct. 1823), is not to the contrary. The case did not even involve Oneida Nation lands or any controversy about the meaning of the Treaty of Fort Schuyler. Rather, it involved an individual Oneida's non-reservation land (granted by the State for military service) which the court held came within New York laws forbidding alienation to non-Indians without state approval. Along the way, the court, in one sentence, referred imprecisely to a cession and retrocession in the Ft. Schuyler treaty (never quoting or analyzing the treaty language). It made these references, however, not to deny the protected status of Nation lands, but, in the very next sentence, to confirm that, after the treaty, the Nation's lands remained protected against alienation (implying similar status for the individual Oneida's non-reservation land). The court specifically stated that the Nation's lands remained immune from taxation. 1823 N.Y. Lexis at *31-36.[7] A single passing reference to "retrocession" cannot alter the 1788 treaty's preservation of the Oneidas' possessory rights.

Not surprisingly, a New York legislative committee rejected any interpretation of the 1788 Oneida treaty as

[7] *Goodell's* offhand incorrect reference is the source of the other "authorities" Sherrill and its County amici rely on, including the cryptic dictum in *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), which then became the basis for the decision in the American and British Claims arbitration. Pet. Br. 21-22.



"treating the title of the Indians to these lands as having been derived from an *appropriation by the State*, when in fact it was a *reservation by the Indians*, an original ownership." N.Y. Assembly Rep. No. 142, at 3 (May 24, 1878) (emphasis in original). An 1882 opinion by the New York Attorney General construed identical language in the 1788 treaty with the Onondagas to "recognize[] and confirm[]" the tribe's "immemorially recognized right of occupancy * * * in the most solemn manner in which this State could recognize and confirm the same." N.Y. Sen. Rep. No. 77, at 2 (Apr. 4, 1882).[8] The New York Court of Claims later described the Treaty of Canandaigua as "confirm[ing] the Onondagas' aboriginal right of possession." *Andrews v. State*, 79 N.Y.S. 2d 479, 482 (N.Y. Ct. Cl. 1948).

Finally, the limited nature of New York's authority at the time of the 1788 Ft. Schuyler treaty confirms that the treaty cannot be read to have extinguished the Nation's aboriginal right of possession in the reserved lands, thereby transferring to New York political power (including taxation) over the Oneidas and the land on which they resided. *First*, that reading would infringe the national government's power to "regulat[e] and manag[e] all affairs with the Indians," under the Articles of Confederation, Art. IX(4).[9]

[8] The State made a treaty with the Onondagas in 1788 worded like the Treaty of Ft. Schuyler. The Onondagas retain possession of a large block of land south of Syracuse. It is not taxed, and has never been. *See* Brief of Amici Cayuga Indian Nation of New York, *et al.*

[9] A proviso in Article IX(4) left some power to the States, but that proviso did not allow the termination of basic possessory rights in land the tribe continued to occupy. *See* Letter from James Madison to James Monroe (Nov. 27, 1784), *in* 2 The Founders' Constitution 529 (1987) ("If this proviso be taken in its full latitude, it must destroy the authority of Congress altogether."). The Second Circuit read the proviso to allow a more limited exercise of state authority to purchase land with tribal consent in *Oneida Indian Nation v. New York*, 860 F.2d 1145 (2d Cir. 1988).

*Second*, the proposed reading would treat the Ft. Schuyler treaty as "preempting" exclusive federal authority over Indian commerce under the new Constitution. New York signed the Ft. Schuyler treaty on September 22, 1788, two months after it ratified the Constitution, three months after the requisite ratification by nine states, and nine days after Congress approved the resolution putting the Constitution into operation. *See* Resolution of Sept. 13, 1788, *in* 4 The Founders' Constitution 670 (declaring the Constitution to have "been ratified in the manner declared to be sufficient for the establishment of the same"). The Ft. Schuyler treaty should not be read to breach the Constitution's already-effective limits on the power of signatory states to take actions committed to the federal government. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., joined by Rehnquist, C.J., O'Connor and Scalia, JJ., dissenting).[10]

### B. The Nonintercourse Act Protected the Oneidas' Possessory Right.

The Nonintercourse Act, first enacted in 1790, forbids conveyance of land, "or any title or claim thereto," from any Indian tribes without the requisite federal consent. In 1790, the Oneida Nation was in occupancy of the reserved land, and the land was not subject to taxation. No matter how the Oneidas' right in and occupancy of the reserved land are

[10] In *Owings v. Speed*, 18 U.S. 420 (1820), this Court held that Virginia could break a contract after it ratified the Constitution but before the new government was installed. That action by Virginia, however, did not impair the powers of the new government or interfere with the interests of the other states that had mutually covenanted to be bound by the Constitution. For analysis of when aspects of the Constitution became effective, see Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?* 77 Notre Dame L. Rev. 1 (2001); and Vasan Kevasan, *Essay: When Did the Articles of Confederation Cease to Be Law?* 78 Notre Dame L. Rev. 35 (2002) (agreeing that states were bound by limitations in the Constitution upon its establishment).



characterized, Congress protected those rights and that occupancy.

### C. The Federal Treaty of Canandaigua Protected the Oneidas' Reserved Lands From State Taxation.

The Treaty of Canandaigua formally confirmed federal protection and preempted state tax laws. It acknowledged the reservation as the Oneidas' "property" and promised the Oneidas "the free use and enjoyment thereof," confirming its status as a reservation (and hence, Indian country). Pet. App. 142-43. It is irrelevant that the federal treaty adopted by reference the boundaries of the Oneida reservation drawn in the 1788 state treaty. State protection does not preclude federal protection. *Oneida I*, 414 U.S. at 672 n.7, 673 n.8. There is no dispute that the Oneidas were in possession and had a perpetual right of occupancy. The federal government, in the exercise of its plenary and exclusive powers over relations with Indian tribes under the Constitution, could and did protect a perpetual right of possession already acknowledged in a state treaty.

The Treaty of Canandaigua extends the same promise of federal protection to the Oneidas as it does to the Senecas. Pet. App. 141-43. It uses the same "acknowledge[ment]" language. *Id.* The United States had no reason to offer less protection to the Oneidas, its allies in the war, than to the Senecas, its adversaries. This Court has already established the Senecas' protection against property taxes under the Treaty of Canandaigua. *New York Indians I, supra.*

Even if the lands were not aboriginal lands and had not already been immune from taxation, the federal government could protect tribal lands from alienation through tax foreclosures. The Court held in *Board of County Commissioners v. Seber*, 318 U.S. 705, 717-18 (1943), that the federal government could extend tax immunity to land purchased and

titled to an individual Indian. "The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts." *Id.* at 718. In *United States v. John*, 437 U.S. 634, 652-53 (1978), the Court upheld the federal government's authority to protect tribal land as Indian country (thereby removing it from the tax rolls and state criminal jurisdiction), without regard to whether the land previously had been subject to state jurisdiction and taxation. *Cf. Menominee Tribe v. United States*, 391 U.S. 404, 411 n.12 (1968) (any state jurisdiction over land during a lapse in reservation status "would not have survived" later federal treaty and its recognition of tribal rights).

Amici Madison and Oneida Counties suggest that the 1794 treaty should be construed narrowly to avoid the constitutional question whether the United States can take property belonging to the States. MOC Br. 4 (citing *United States v. Minnesota*, 270 U.S. 181, 209 (1926)). But this argument (not made by Sherrill and not made by the Counties in this case below or in *Oneida I* and *II*) offers not a construction but an outright nullification of the entirety of Article 2.[11] It is incorrect also because giving the 1794 treaty its plain meaning takes no property right from New York, which, both before and after the 1794 treaty, held fee title burdened by a tribal possessory right. Political control over a tribe in possession of land is exclusively federal under the Constitution and is not the subject of *Minnesota* and its questions about federal constitutional power with regard to state property.[12]

[11] The suggestion is inconsistent with Sherrill's contention that the Oneidas must apply to have land taken into trust, an illusory option if the Constitution forbids federal protection of the land. Pet. Br. 29-31.

[12] The Counties' separate claim that "[t]he Second Circuit's decision violates the Tenth Amendment" by diminishing sovereign powers of New York, MOC Br. 27-30, is outside any of the questions presented and is also without merit. The State neither claimed nor exercised political sovereignty over the Oneida reservation as a result of the 1788 treaty, and the Counties offer no evidence that the treaty was understood by the parties as extending state sovereignty over the reservation. *Goodell v. Jackson*, shows it was not so understood. Moreover, the later illegal land acquisitions by New York could not give it sovereign power that the Constitution assigns to the national government. *United States v. Lara*, 124 S. Ct. 1628, 1633 (2004) (referring to Congress' "broad general powers to legislate in respect to Indian tribes, powers we have consistently described as 'plenary and exclusive'"). When a federal treaty has established an Indian reservation, only Congress can disestablish that reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Federal supremacy principles preclude a state from eliminating reservation status by its own actions. *See Oneida I*, 414 U.S. at 673-74, n.8 (quoting *People ex rel. Cusick v. Daly*, 212 N.Y. 183, 196-97 (1914)); *cf. United States v. Holliday*, 70 U.S. 407, 419 (1865) (states cannot "withdraw" Indians from federal protection).



## III. THE 1838 TREATY OF BUFFALO CREEK DID NOT DISESTABLISH THE ONEIDA RESERVATION.

Sherrill contends that the Treaty of Buffalo Creek "required the Oneidas to permanently abandon their lands in New York," Pet. Br. *i*, and thereby terminated protection for the entire reservation, including land, like the land at issue here, that was not the subject of the treaty because it had been illegally alienated before 1838. This contention is wrong. The treaty did not mandate Oneida removal, and neither the United States or the Oneidas understood it to terminate the Oneida reservation.

### A. The Relevant Question Is Whether the Oneidas, as Well as the United States, Intended to Disestablish the Oneida Reservation.

Sherrill incorrectly focuses on its view of congressional intent, as if it were addressing construction of a federal statute. Pet. Br. 36-37. The Treaty of Buffalo Creek was not unilateral federal legislation, but a bilateral agreement between two governments. Moreover, it was an Indian treaty,

subject to a well-developed body of law based on the unequal positions of the United States and Indian tribes and the trust relationship between them. It is well-established that an Indian treaty must be applied as understood by the tribe. *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 195 & 196 (1999); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

It is also "well established that treaties should be construed liberally in favor of the Indians." *Oneida II*, 470 U.S at 247. Even when a statute is at issue, "[a] congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *see DeCoteau v. Dist. County Court*, 420 U.S. 425, 444 (1975); *Solem*, 465 U.S. at 470. A treaty must be no less clear.

### B. The Treaty Text Does Not Establish the Required Intention to Disestablish the Oneida Reservation.

#### 1. *The Treaty Did Not Ratify the Illegal Pre-Treaty Transfers.*

The Treaty of Buffalo Creek did not extinguish Oneida title (and the concomitant tax immunity) in land transferred before 1838 by ratifying those earlier, illegal transfers. In *Oneida II*, the District Court rejected the argument that the Treaty of Buffalo Creek ratified earlier illegal land sales, 434 F. Supp. at 539, and the Counties reasserted the argument in this Court. Reply Brief of the County of Oneida and the County of Madison, at 18-19, *County of Oneida v. Oneida Indian Nation*, Nos. 83-1065 & 83-1240; *cf. Oneida II*, 470 U.S. at 269 n.24 (Stevens, J., dissenting) (referring to discussion of treaty in amicus brief of United States). The Court did not address the argument but did reject the stronger argument for ratification of a 1795 sale by subsequent 1798 and 1802



treaties. *Oneida II*, 470 U.S. at 246-48 & nn. 19-20. The 1798 and 1802 treaties drew boundaries based on "the last purchase from" the Oneidas and "other lands heretofore ceded by the said Oneida nation." *Id.* Even those references to the prior transaction were not sufficiently "explicit" or "plain and unambiguous" to extinguish Oneida possessory rights. *Id.*

The Treaty of Buffalo Creek, in contrast, made no reference to prior land sales at all, and there is no evidence of negotiations about such land. *See Mille Lacs*, 526 U.S. at 197-98 (rejecting an effect of treaty never mentioned to tribe during negotiations). Accordingly, there is no logic by which the Treaty of Buffalo Creek's references to land actually in Oneida possession can be said to comprehend "plain and ambiguous" or "explicit" extinguishment of Oneida title in land not mentioned in the treaty, not discussed during negotiations, and not in the contemplation of any party to the treaty. At most, argument about the treaty's effect on property not addressed in the treaty is about what the United States or the Oneidas might have done if the subject had come up; there can be no legally effective ratification or extinguishment in such circumstances.

#### 2. *The Treaty Did Not Mandate Sale of Oneida Lands or Oneida Removal.*

The 1838 treaty nowhere ceded any Oneida lands or mandated sale or removal. Article 13 conditioned Oneida removal on future "satisfactory arrangements" regarding sale of land to the State of New York. Pet. App. 155. Contracts that condition something on the "satisfaction" of a party routinely are interpreted not to compel a party to be satisfied but to leave it up to the party to make that determination. 13 Williston on Contracts § 38:21 (4th ed. 2000). Moreover, the absence of a price term meant, as in any contract, that there was no enforceable agreement of sale. *See Williams v. Morris*, 95 U.S. 444, 455 (1877) ("Decided cases everywhere

require that the memorandum should mention the price."). In addition, not only the Oneidas but the United States had to be satisfied with any later terms of sale; the treaty did not repeal the Nonintercourse Act, which remained applicable and required federal involvement in purchase negotiations and in approval of the purchase and its terms. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (Act's "obvious purpose is to prevent unfair, improvident or improper disposition * * * by Indians").[13]

Other provisions of the treaty made clear that some or all of the Oneidas and other New York Indians might not remove. Article 3 provided that "such of the * * * New York Indians as do not accept and agree to remove * * * shall forfeit all interest in the [Kansas] lands." Pet. App. 150. Article 3 vested the President with discretion about when, if ever, to permit removal. Article 15, added by the Senate, provided for appropriations to be made "from time to time under the direction of the President of the United States in such proportions" as needed. *Id.* 156-57. Proportionate appropriations were required because not all the money would be needed if not all the Indians removed. *See New York Indians v. United States*, 30 Ct. Cl. 413 (1895) ("article 15 * * * should be read with article 3"). Further, the Senate deleted a provision that seemed to obligate the United States to remove the Indians: "[t]he United States stipulate & agree to remove all the New York Indians * * * ." S. Exec. J. 127 (June 11, 1838). By deleting it, and by leaving removal to the discretion of the President under articles 3 and 15, the Senate clarified that even voluntary removal might not occur. *See id.* at 130 (resolution directing reduction in removal funds and

[13] Authorization of "uncertain future sales" with "uncertain future proceeds" does not terminate reservation status, *DeCoteau*, 420 U.S. at 448, because it lacks "an unconditional divestiture of indian interest in lands," *Solem*, 465 U.S. at 469 n.10 (holding no termination of reservation by statute authorizing government "to sell and dispose of" tribal land).



Kansas lands in proportion to number who choose not to remove).[14]

Articles 10 and 14 treated Seneca and Tuscarora land in New York differently from Oneida lands. Without condition, these articles ceded land and required the Senecas and Tuscaroras to go to Kansas and to "continue to reside there." Pet. App. 155. Even as to these tribes, the treaty did not of itself terminate federal protections. *See New York Indians I*, *supra*; *Fellows v. Blacksmith*, 60 U.S. 366 (1856); *New York Indians II*, 170 U.S. at 21.

Article 2 refers to the Removal Act, but that does not suggest compulsory removal. Pet. Br. 36-37. The Removal Act contemplated voluntary removal, restricted to "such tribes or nations of Indians as may choose to exchange the lands where they now reside." Act of May 28, 1830, 4 Stat. 411, § 1. The treaty's "exchange" of lands did not involve lands in New York. Article 2 provided, "[i]n consideration of the above [Wisconsin] cession and relinquishment," that the United States would set aside the Kansas lands. Pet. App.

[14] The treaty was consistent with earlier treaties with the Menominee that permitted voluntary removal of the New York Indians to Wisconsin. *See* Treaty with the Menominee, 7 Stat. 342 (Feb. 8, 1831); Treaty with the Menominee, 7 Stat 346 (Feb. 17, 1831) (making "unlimited the time of removal and settlement upon these lands by the New York Indians"); Treaty with the Menominee, 7 Stat. 405 (Oct. 27, 1832). A policy of voluntary removal is also reflected in efforts from 1836 forward to negotiate the Treaty of Duck Creek. S. Exec. Doc. No. Confidential G, 24th Cong., 2nd Sess. (Jan. 25, 1837). Although never ratified because superseded by the Treaty of Buffalo Creek, the Treaty of Duck Creek was drafted by the United States to exchange Wisconsin lands for lands to the west and to permit voluntary emigration to them by the New York Indians in Wisconsin and New York. The treaty provided that the United States would bear the cost of removal whenever any "portion" of any tribe was "willing and prepared to remove" and that persons who did not remove forfeited lands. *Id.* at 2.

149-50. The reference to the Removal Act was in connection with the Wisconsin-Kansas exchange and simply specified that the Kansas lands would be held according to the type of patent authorized by the Act.

### C. The Record of Treaty Negotiations Establishes that the United States and the Oneidas Understood the Treaty Not to Compel Land Sales or Removal.

The treaty was signed on January 15, 1838. Almost immediately, the federal treaty Commissioner, Ransom Gillet, explained that it did not mandate removal.

On January 18, 1838, Gillet wrote the Commissioner of Indian Affairs to explain that the two Oneidas from New York who signed the treaty acted for themselves and had not committed other Oneidas to remove. "None of them profess to have power conclusively to bind their nation." Gillet added: "The business with the Tuscaroras is intirely [sic] completed. That with the Oneidas at the Castle, as far as the powers of those present will permit it to be done." Letter from Ransom Gillet to C.A. Harris, Comm'r of Indian Affairs (Jan. 18, 1838) (available on Nat'l Archives Microfilm Publ'n M234, roll 583, frames 548-49).

On February 27, 1838, Gillet again wrote to the Commissioner of Indian Affairs, responding to a February 14, 1838, letter from the Oneidas informing the President that they did not intend to remove from New York. S. Exec. Doc. No. Confidential 10E, 25th Cong., 2d Sess., at 54-56 (April 23, 1838). In his response, Gillet acknowledged that the Oneidas did not want the treaty to "operate on their interests without their consent" but declared: "This is a misapprehension of its provisions." *Id.* at 27-28. Referring to the objection that the two Oneidas who signed the treaty acted only for themselves, Gillet also declared: "Nothing more than what is here conceded they had a right to do, was attempted by those who



attended the council." *Id.; see also* S. Exec. Doc. No. Confidential 16, 25th Cong., 2d Sess., at 1-2 (May 7, 1838) (letter from Oneidas to the Senate indicating no intent to remove).

The Senate amended the treaty on June 11, 1838, conditioned on subsequent tribal assent. S. Exec. J. 126-31 (June 11, 1838); *see* p. 5, *supra*. Gillet then met with the Oneidas in council at Oneida. He gave this written assurance, which resonates loudly in this case and of its own force refutes Sherrill's argument regarding mandatory sales and removal:

> I hereby most solemnly assure them that the treaty was not, & is not intended to compel the Oneidas to remove from their reservations in the state of New York to the west of the state of Missouri or elsewhere unless they shall hereafter voluntarily sell their land where they reside & agree to do so. They can, if they choose to do so remain where they are forever. The treaty gives them lands if they go to them and settle there, but they need not go unless they wish to. When they wish to remove, they can sell their lands to the Governor of the State of New York, & then emigrate. But they will not be compelled to sell or remove.

Resp. App. 10-11.[15] In a report reproduced for the Senate, S. Exec. Doc. No. Confidential B, 26th Cong., 1st Sess., at 29-40 (Jan. 14, 1840), Gillet stated:

> Some of the tribe expressed their fears that they might be compelled to remove, even without selling their land to the State, and desired some evidence from me that such would not be the construction of the papers. On consulting with Timothy Jenkins, Esquire, their local State agent, I drew up and gave them an assurance to that

[15] Gillet gave the same assurance to the St. Regis Mohawks on February 13, 1838, explaining in a supplemental treaty article that they "shall be at liberty to remove" but that the United States "shall not compel them to remove." S. Exec. Doc. No. Confidential 10E, 25th Cong., 2d Sess., at 23-24 (Apr. 23, 1838).

> effect, a copy of which I hand you, marked No. 1. On receiving this, a large number signed the written assent * * *."[16]

The treaty also notes that the Oneidas signed after Gillet "fully and fairly explained" it. Pet. App. 173-74. The meaning of the treaty described to the Oneidas by Gillet is controlling. *See New York Indians II*, 170 U.S. at 33 (relying on commissioner's statement about "rights of the Indians" under Treaty of Buffalo Creek).

In *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999), the question was whether a treaty ceding "all right, title, and interest" in land extinguished tribal hunting and fishing rights secured in an earlier treaty. *Id.* at 195. The Court noted that it had found an extinguishment of hunting and fishing rights in "similar language" in a treaty made by a different tribe. *Id.* at 202. Nevertheless, the Court explained that "review of the history and the negotiations of the agreements is central to the interpretation of treaties" and that tribal understanding, as revealed by such review, is controlling. *Id.* at 196, 202. The federal negotiator never told the Indians that the treaty would affect hunting and fishing rights, and no party spoke about the hunting and fishing rights. *Id.* at 197-98. Accordingly, the Court held that the treaty did not extinguish hunting and fishing rights.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the question was whether treaties permitting tribes a right of fishing at the "usual and accustomed" places "in common with all citizens" entitled the tribes to a reserved allocation of fish that could

[16] Gillet's report was transmitted to the Senate and was printed, S. Exec. Doc. No. Confidential B, 26th Cong., 1st Sess., at 29-40 (Jan. 14, 1840), but it appears that Gillet's assurances to the Oneidas and the other attachments to the report were not printed. The Senate later returned those documents. Nat'l Archives microfilm publ'n M234, reel 583, frames 0966-89.



not be taken by non-Indians. *Id.* at 675. The Court recognized that the treaty's words might not secure that right. *Id.* at 677-78. The Court observed that the federal commissioner gave the Indians "his assurances" that the treaty permitted them to continue to fish, and the Court relied on those assurances in deciding the case. *Id.* at 667-68 & n.11, 677-78. The Court emphasized that the negotiator's promises "were crucial in obtaining the Indians' assent" and that the tribe had asserted the importance of fishing rights. *Id.* at 676. Noting that an Indian treaty must be interpreted as it was understood by the Indians, the Court held that a right to fish "in common" with all citizens would have been understood by the tribes as permitting them a reserved allocation—*i.e.*, greater fishing rights than non-Indians have. *Id.* at 675-76.

The Commissioner's assurances to the Oneidas in 1838 are even more powerful than statements of the treaty negotiators in *Washington* and in *Mille Lacs*. *Washington* involved vague statements by the federal negotiator concerning fishing rights. *Mille Lacs* involved the mere absence of a statement by the negotiator that the treaty was meant to eliminate hunting and fishing rights. In neither case did the negotiator affirmatively describe to the Indians a specific meaning of the treaty, as Gillet did.

It is impossible to square Sherrill's mandatory-sale-and-removal argument with Gillet's assurances. The assurances conclusively nailed down what the Oneidas understood in 1838, and, as well, what "the construction of the papers" would be in the future. There was no gap between how non-Indian treaty drafters and the Indians understood the treaty. Everyone—Indian and non-Indian—could understand the assurance of the United States Commissioner: "they will not be compelled to sell or remove." JA 146.

### D. No Other Facts Reflect Disestablishment of the Oneida Reservation.

#### 1. *Failure of the Kansas Reservation*

The Treaty of Buffalo Creek failed, so far as establishing a Kansas reservation was concerned. The discretion given to the President in the treaty regarding removal was exercised in favor of keeping the New York Indians in New York. The United States affirmatively told the Indians not to remove and tried to stop removal by the small party that actually went to Kansas in 1846. JA 168-69. Most of that party died or returned to New York, and the United States never appropriated funds for removal thereafter or otherwise attempted removal. *Id.* The United States instead spent funds to reestablish the Tonawanda Senecas and the Senecas in New York. 11 Stat. 735 (Nov. 5, 1857); 7 Stat. 586 (May 20, 1842). Perhaps most important, the United States restored the Kansas lands to the public domain and sold them, making removal impossible.

There is no evidence that, having eliminated the Kansas option, the United States intended to leave the New York Indians with no reservation (or that the Indians agreed to that). The United States continued to recognize the Oneidas' rights in reservation land in their possession in New York, eventually suing in *Boylan* to protect the Oneidas' rights. Maps prepared for the Commissioner of Indian Affairs consistently show an Oneida reservation.[17] New York tribes

[17] Sherrill relies on a few statements, in the nature of uninformed legal assertions, that there was no Oneida reservation. Most of the statements were made before the rights of the Oneidas were even partially clarified in the *Boylan* litigation. For many years, federal and state officials mistakenly believed that New York had jurisdiction over Indian tribes within the state. *Oneida I*, 414 U.S. at 678 & n. 13. In any event, Sherrill's statements are a few outliers dwarfed by the consistent indication in the Commissioner of Indian Affairs' annual reports concerning the continued existence of the Oneida reservation. *Cf. Hagen v. Utah*, 510 U.S. 399, 420 (1994) (where text and contemporaneous evidence



remain in New York to this day. 68 Fed. Reg. 68180 (Dec. 5, 2003) (recognizing "Onondaga Nation of New York," "Cayuga Nation of New York," "Tonawanda Band of Seneca Indians of New York," "Oneida Nation of New York," "St. Regis Band of Mohawk Indians of New York," and "Seneca Nation of New York").

For the first time, Sherrill argues relinquishment based upon *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941), a case not cited in Sherrill's petition for certiorari or in its briefs in the Second Circuit. The contention is not fairly included in the question Sherrill presented regarding disestablishment by the Treaty of Buffalo Creek, Pet. Br. *i*, and is, regardless, wrong. *Santa Fe* actually held that a tribe had not lost its original reservation when a substitute reservation failed, 314 U.S. at 355, as was true of the Kansas lands reserved for the New York Indians.

*Santa Fe* addressed two efforts to relocate a tribe that occupied aboriginal lands not protected by a federal treaty. *Id.* at 344-46. The Court concluded that the first, failed effort to remove the tribe to a new reservation did not end the tribe's rights in the original reservation, viewing the new reservation only as an "offer." The offer, akin to the offer of Kansas land to New York Indians, did not imply an intention "to extinguish all of the rights which the [tribe] had in their ancestral home." *Id.* at 353; *see also Mattz*, 412 U.S. at 487-88 (after new reservation created, most returned to existing reservation, and new reservation "was then discontinued").

answer disestablishment question, "confusion in the subsequent legislative record" does not alter answer); *Solem*, 465 U.S. at 474-75, 478 (legislative history referred to "reduced reservation," "reservations as diminished," and "reservations thus diminished" were "isolated phrases" that did not clearly show an intent to diminish reservation); *Seymour v. Superintendent*, 368 U.S. 351, 356 n.12 (1962) (two later statutes referring to the "former" reservation show congressional confusion, not disestablishment).

The Court held that the tribe did relinquish its aboriginal land by a later executive order creating a new reservation at the request of "[a] majority of the tribe, 'in council assembled.'" *Santa Fe*, 314 U.S. at 356. The Court noted that some of the tribe's members moved to the new reservation and stayed there; although many tribal members did not use the new reservation, there was evidence "that the Indians were satisfied" with it; and it was never "abandoned." *Id.* at 357. The Court "deemed" the acceptance of the new reservation to relinquish tribal rights in aboriginal land outside the new reservation. *Id.* at 358.

The Oneidas did not relinquish their New York reservation under the standard articulated in *Santa Fe*. They did not request, go to or keep a Kansas reservation. Any effort of the New York Indians to remove to Kansas was nipped in the bud by the United States, which directed that removal not occur and would not appropriate funds to pay for it. The United States sold all the Kansas land. *Santa Fe* compels the conclusion that the Kansas reservation failed and that the Oneidas did not relinquish rights in New York. *See Mille Lacs*, 526 U.S. at 172 (after presidential order compelling removal and revoking usufruct rights, Secretary of Interior suspended removal efforts, which Court held preserved usufruct rights because their revocation was "integral" to removal effort, which failed).

### 2. *Subsequent History in New York*

Sherrill and some amici also emphasize the post-1838 jurisdictional and demographic history of the Oneidas' lands. *See South Dakota v. Yankton Sioux*, 522 U.S. 329, 356 (1998) (subsequent history is of limited value). In this case, the demographic changes cannot be attributed to the Treaty of Buffalo Creek at all, but rather to the illegal state transactions that alienated almost all of the reservation before the treaty. Even if the 1838 treaty had not been made, the lands at issue here, like the other land alienated before 1838, would have been in non-Indian hands. In those circumstances, relying on demographic changes to support disestablishment of a reservation would be to give legal effect to illegal transactions. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 669 n.14 (dominance of non-Indian fishing irrelevant to persistence of tribal fishing right where non-Indian dominance caused by illegal incursion on tribal rights and illegal exclusion of Indians).[18]



### 3. *New York Indians II Litigation*

Sherrill argues that the damages awarded in *New York Indians II* worked the same relinquishment that would have occurred if all the Oneidas had sold and moved to Kansas. Those damages, however, were paid to compensate the New York Indians for the Wisconsin land they irrevocably ceded in exchange for the Kansas land, not to compensate them for lands in New York. Otherwise, the federal government would have been unjustly enriched by receiving the Wisconsin lands and giving nothing in return. *See New York Indians II*, 170 U.S. at 24 (United States sold and received consideration for both the Wisconsin and Kansas lands). While the possibility of removal from New York may have been part of the "inducement" for the United States to make the treaty, *id.* at 15, it was no part of the bargain enforced by the Court's damage award. *New York Indians II* merely required "compensation to the Indians for the seizure and sale of the Wisconsin lands." *Id.* at 29.[19]

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[18] In *Yankton Sioux*, the Court quoted *Solem*'s reference to "*de facto*, if not *de jure*, diminishment" and observed that evidence of *de facto* treatment of land "is the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." 522 U.S. at 356.

[19] Amicus New York refers to Senator Platt's statement, made in 1893 when discussing authorization for the Court of Claims to adjudicate the

The Court's award contained no set-off for any amount that any New York Indians, such as the Seneca and Tuscarora, had earlier received for lands in New York, although it did set off the amount of an earlier federal settlement with the Tonawanda Senecas. *Id.* at 36. Neither the Court, nor the United States, nor any of the tribal parties—who at the time of the litigation were on their New York reservations – considered that rights in New York lands were adjudicated or extinguished in the litigation.[20]

## IV. THE ONEIDA INDIAN NATION OF NEW YORK ALWAYS HAS BEEN AN INDIAN TRIBE ENTITLED TO EXERCISE FEDERALLY PROTECTED RIGHTS IN ONEIDA LAND.

Sherrill's final argument addresses tribal status, not any disposition of the possessory right by the tribe or the federal government. It argues that there is a material factual dispute about whether "there was a lapse" in tribal status. Pet. Br. 41. This contention is wrong. *First*, the determination by the political branches that the Nation persisted is dispositive. *Second*, so long as the trust relationship between the United States and the tribe has not been terminated or abandoned, a lapse in tribal status is irrelevant to whether federal laws and

New York Indians' claim, that the Treaty of Buffalo Creek exchanged New York lands for Kansas lands. NY Br. 11, 20. Senator Platt prefaced his remarks: "I had not thought that this measure was coming up at this time, and perhaps I may not be able to recall the facts." 24 Cong. Rec. 588 (Jan. 16, 1893).

[20] Prior to the litigation, the United States tried to settle the Kansas claim through a treaty and told the tribes that payment for the Kansas lands had no effect on their rights in New York. "[T]he commissioner informed them that making a treaty about the Kansas lands would not deprive them of any of their rights to the New York reservation, nor would it impair their title in any way." S. Exec. Doc. No. Confidential Y, 40th Cong., 3d Sess., at 475-76 (1869); *see also New York Indians II*, 170 U.S. at 33.



treaties continue to protect tribal land. *Third*, Sherrill's evidence does not create a genuine factual dispute about tribal continuity that would be legally material under any conceivable standard.[21]

### A. The Persistence of the Nation Is Conclusively Recognized by the Federal Government.

Decisions to recognize Indian tribes are committed to the political branches. *See* Amicus Curiae Brief of the United South and Eastern Tribes, Inc. The Department of the Interior recognizes the Oneida Indian Nation of New York as a tribe with rights under federal laws and treaties, and has repeatedly done so both formally and informally without interruption. Sherrill does not claim that the federal government ever withdrew or terminated its recognition of the Oneida Nation as a tribe in New York.

Federal recognition "establishes tribal status for all federal purposes," H.R. Rep. No. 103-781, at 2-3 (1994), not just eligibility for benefits. If there is a tribal continuity requirement, federal recognition satisfies it, because the Department's "position is, and has always been, that the essential requirement for acknowledgment is continuity of tribal existence rather than previous acknowledgment." 59 Fed.

[21] Sherrill denies only the continuity of the tribe. What is not in dispute is that the Oneida Indian Nation of New York is a tribe now, JA 36, 64 (admissions); *see also* 68 Fed. Reg. 68180, 68182 (Dec. 5, 2003) (most recent list of recognized tribes), and was recognized as a tribe by the federal government when it made treaties in 1784, 1789, 1794, and 1838 and also at the time the land in question was alienated. Pet. App. 43, n.23; *see also* 25 C.F.R. § 83.8(c)(1) (treaties are a form of federal recognition). Nor has Sherrill disputed that the Nation is the same tribe or a successor to the tribe that signed the Oneida treaties, which is established in the record. JA 207-08 (affidavit); Pet. App. 44 (Court of Appeals noting that Nation is a "direct descendant").

Reg. 9280 (Feb. 25, 1994).[22] In 1994, Congress expressly charged the Secretary of the Interior with responsibility for "keeping a list of all federally recognized tribes" and prohibited the termination of a recognized tribe except by an act of Congress. Pub. L. 103-454, § 103, 108 Stat. 4791, *codified at* 25 U.S.C. § 479a, note; *see* 43 U.S.C. § 1457; 25 U.S.C. § 9.

A determination that tribal status has not terminated is by its nature a political determination. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *Seber*, 318 U.S. at 718; *United States v. Nice*, 241 U.S. 591, 598 (1916); *United States v. Rickert*, 188 U.S. 432, 445 (1903); *see also Baker v. Carr*, 369 U.S. 186, 215-16 (1962) (citing tribal recognition as an example of a political question). Tribal recognition is a "formal political act * * * [that] imposes on the government a fiduciary trust relationship to the tribe and its members," not solely a factual determination. H.R. Rep. No. 103-781, at 2-3; *see also* Handbook of Federal Indian Law, at 6 (federal government has combined and divided tribes and united scattered Indian communities into tribes). The political branches are better suited to make "an inherently policy-based decision," *United States v. Bean*, 537 U.S. 71, 77 (2002), as well as to sift through the ethnographic records typically presented in a dispute over tribal acknowledgment. *See* B. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L. Rev. 491, 495 (2003).

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[22] In reviewing petitions for acknowledgment by tribes never before recognized by the federal government, the Department of the Interior does not require proof of the "[e]xistence of community and political influence or authority * * * at every point in time." 25 C.F.R. § 83.6(e). "Fluctuations in tribal activity during various years" do not preclude federal recognition. *Id.* That interpretation, set forth in published regulations pursuant to congressional delegation, is entitled to deference. *Barnhart v. Thomas*, 124 S. Ct. 376, 380 (2003); *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984).



The question whether a tribal government persists sufficiently so that treaty rights persist also is consigned to the political branches, just as it is with foreign governments. *Clark v. Allen*, 331 U.S. 503, 513 (1947) (rejecting contention that treaty lapsed because Germany "ceased to exist"); *see also Terlinden v. Ames*, 184 U.S. 270, 286-87 (1902).[23]

### B. Federal Protection of Tribal Land Continues Unless the Trust Relationship Between the United States and the Tribe Is Terminated or Abandoned.

Sherrill does not claim that the federal government ever terminated its relationship with the tribe. Nor, although it quotes cases about abandonment of the trust relationship by a tribe, Pet. Br. 41-43, does Sherrill claim that the Oneidas ever abandoned tribal status. *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (abandonment means tribe "intend[ed] to give up their tribal organization and abandon their rights and status voluntarily"). Instead, Sherrill claims that any "lapse" in tribal status is fatal and that federal protection vanishes from "the moment in time when the lapse begins." Pet. Br. 43. This contention is unsupported. Sherrill does not explain what a "lapse" is, or why it would remove federal protection, except to insist that logic requires

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[23] New government decisions to acknowledge tribes may now be reviewable because regulations "bring the tribal recognition process within the scope of the Administrative Procedure Act," *Miami Nation v. Dep't of Interior*, 255 F.3d 342, 348 (7th Cir. 2001), but Sherrill would lose an APA challenge. The standard is whether agency action is "arbitrary and capricious." 5 U.S.C. § 706. Acknowledgment of the Oneida Indian Nation is neither. "Unambiguous previous federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment." 25 C.F.R. § 83.8(a). Prior federal acknowledgment includes the federal government's invitation to the Oneida Indian Nation to reorganize under the Indian Reorganization Act in 1936, and the federal government's suit to recover land as trustee for the Oneida tribe in *United States v. Boylan*.

it. *Id.* 41. Sherrill's amici do not support that extreme position, focusing instead on whether the tribe claiming rights is a successor to the tribe that made a treaty, a question committed to the political branches and not disputed in this case. Br. of Cayuga & Seneca Counties, at 8-9 ("even a five- or ten-year lapse, might not break the connection between the historic tribe's treaty rights and the modern group claiming those rights").

Continuity, as Sherrill uses the term, does not determine whether federal protection persists because the federal government can act to protect tribal land in the absence of a tribal government. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 664 (some signatory tribes "had little or no tribal organization"); *United States v. McGowan*, 302 U.S. 535, 539 (1938) (land set aside for homeless Indians scattered across Nevada is Indian country).

The decisions most pertinent to Sherrill's novel claim preclude it. In *United States v. John*, 437 U.S. 634, 652 (1978), the Court upheld federal authority to protect Mississippi Choctaw land as Indian country notwithstanding "the long lapse in the federal recognition of a tribal organization in Mississippi." *See also Winton v. Amos*, 255 U.S. 373, 378 (1921); Brief for the United States at 8-9, *United States v. John*, Nos. 77-836 & 77-575 (quoting *Winton*). This Court has also held that the statutory termination of a tribe, which means that its governmental status ceases to exist as a matter of law, did not abrogate a tribe's treaty rights. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *see also South Carolina v. Catawba Tribe*, 476 U.S. 498 (1986).

### C. There Is No Evidence Allowing a Reasonable Finding of Tribal Discontinuity.

The archival evidence presented by Sherrill, Pet. Br. 43-44, would not permit a reasonable factfinder to find tribal discontinuity. The evidence is far too lopsided. *Anderson v.*



*Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) ("whether the evidence presents a sufficient disagreement to require submission to [factfinder] or whether it is so one-sided that one party must prevail as a matter of law;" no triable issue unless "reasonable" finding possible).[24]

The Nation's continuous existence as a tribe within the jurisdiction of the New York Agency is documented in the Annual Reports of the Commissioner of Indian Affairs from 1870 to 1920. The agent duly recorded the Oneida population on the Oneida reservation or "reserve" and on other reservations in New York. *See* Act of July 4, 1884, ch. 180, § 9, 23 Stat. 76 (requiring agent to conduct a census); New York Iroquois Censuses, 1886-1924 (Heritage Books, digital reprint CD-ROM) (reprinting manuscript census records from Nat'l Archives Microfilm Publ'n 595, rolls 290-300); F. Hugo, Manual for the Use of the Legislature of the State of New York, 270 (1918) (listing the Oneida reservation among the "Indian reservations in New York" and recording the population in 1855, 1865, 1875, 1892, 1905, 1910, and 1915). And, in 1915, the United States filed suit as trustee for the Oneidas. Record, at 2-5, *Boylan v. United States*, No. 458 (O.T. 1920). In 1920, the Court of Appeals affirmed the District Court's finding "that the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward." *Boylan*, 265 F. at 174; *see also id.* at 171 (accepting finding that "the Oneida Indians were a distinct people, tribe or band"). Sherrill has advanced nothing that could outweigh the *Boylan* determination of the Oneidas' tribal status at the turn of the twentieth century, made with the benefit of testimony from witnesses living at the time of the supposed

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[24] Sherrill has not sought review of any question concerning the denial of its motion pursuant to Fed. R. Civ. P. 56(f) to defer summary judgment pending additional discovery. *See* Pet. App. 6-47; 109-110. All relevant evidence is readily available in public archives.

lapse in tribal status.[25] *See also Waterman v. Mayor*, 280 N.Y.S.2d 927, 930 (N.Y. Sup. Ct. 1967) ("The proof submitted * * * indicates that the Oneida Indian Reservation does now exist and that there is an Oneida Indian tribe.").

The executive branch also recognized tribal persistence when it invited the Oneidas to reorganize their government under the Indian Reorganization Act in 1936; the Oneidas voted to keep a traditional government. 1936 Annual Report of the Commissioner of Indian Affairs, at 163; *see also* 25 U.S.C. § 476(a) (authorizing reorganization by "[a]ny Indian tribe").

In 1977, the District Court held a trial in the Oneida land claim test case and found that the Oneida Indian Nation of New York met the standard for tribal status in *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977), on which Sherrill relies here. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 538. The court found that the Nation is a "direct descendant[] of the Oneida Indian Nation which inhabited Central New York prior to the Revolutionary War." *Id.* at 532-33. No party disputed that finding before this Court in *Oneida II*, which relied on it in affirming the judgment of liability in favor the Oneidas. 470 U.S. at 253. This Court referred to the Nation as a "direct descendant[] of members of the Oneida Indian Nation." *Id.* at 230.

Sherrill relies, in the end, on two insignificant items from 1891-1892. It points to the 1892 Extra Census Bulletin: Indians, The Six Nations of New York, Pet. Br. 44, but that

[25] One of those witnesses was William Honyost Rockwell, who identified himself as one of the Oneida chiefs. Record at 30, *Boylan v. United States*, No. 458 (O.T. 1920). Chief Rockwell testified before Congress several times. *See Hearings before a Subcomm. of the House Comm. on Indian Affairs*, 71st Cong., 2d Sess. 5046-52 (1931); *Indians of New York, Hearings before the House Comm. on Indian Affairs*, 71st Cong., 2d Sess. 26-35 (1930).



very document describes the distribution of treaty cloth annuities to the Oneida Indian Nation in 1891 and refers to "Abram Hill, the honored Oneida chief." *Id.* at 78. The report includes a photograph of Hill, as well as another Oneida chief. *Id.* (unpaginated). The report also mentions "Alexander Burning, a chief, [who] lives at Oneida." *Id.* at 25. Hill and Burning are identified as the chiefs who gathered the tribal census for the federal Indian agent in 1892. New York Iroquois Censuses, 1892 (Heritage Books, digital reprint CD-ROM) (roll 291, frames 688, 696). And Sherrill points to the conclusory statement of the Interior Department's agent for New York that is reproduced as an attachment to the 1891 Annual Report of the Commissioner of Indian Affairs, Pet. Br. 43-44, a statement that the Oneidas "have no tribal relations, and are without chiefs or other officers." The statement is overwhelmed and disproved by a solid body of contrary evidence, including as to 1891.

Sherrill's other scattered excerpts are also off the point. They do not concern disputed facts, but rather the legal consequences of the conveyances of reservation land and Oneida assimilation and citizenship. Pet. Br. 44-45. Several excerpts concern whether the Oneidas still had a reservation, *see* note 17, *supra*, not whether the Oneidas remained a tribe in New York.[26] *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y.

[26] The same is true of the statement in S. Rep. No. 1836, 81st Cong., 2d Sess., at 5 (1950). The report states clearly that the Oneidas remain a tribe in New York under federal supervision. *Id.* 3; *see also* Compilation of Material Relating to the Indians of the United States, H.R. Rep. No. 30, 81st Cong., 2d Sess., at 80 (1950) (listing Oneida reservation in New York). Sherrill also refers to a 1925 conclusory letter responding to an inquiry about federal payments to the Oneidas. That letter is inconsistent with the government's formal position in *Boylan*, and with the findings in that case. The 1942 edition of Felix Cohen's Handbook of Federal Indian Law, at 417, reprints a 1915 memorandum by an Interior lawyer as an "interesting account." The memorandum is not presented as Cohen's own assessment. *See John*, 437 U.S. at 651 n.20.

1877), was premised on the view, since repudiated by this Court, that a member of an Indian tribe cannot be a citizen. *See United States v. Nice*, 241 U.S. 591 (1916); *Seber*, 318 U.S. at 718; *Tiger v. Western Inv. Co.*, 221 U.S. 286, 311-16 (1911); *Brader v. James*, 246 U.S. 88, 96 (1918). Six years after *Elm*, four Oneida chiefs signed the petition to Congress regarding the Kansas land claim. JA 147-51. The excerpt from the 1906 Annual Report of the Commissioner of Indian Affairs also speaks only to an assimilation consistent with continued tribal status and tax immunity. *Kansas Indians*, 72 U.S. at 756.

In sum, even if there were a legally relevant, judicially determinable issue of tribal continuity for purposes of preserving federally protected possessory rights, there is no genuine issue of fact as to that question in this case. A trier of fact could not reasonably find discontinuity.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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No. 03-855

IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner*,

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF

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Letter from R.H. Gillet to C.A. Harris, Commissioner of Indian Affairs, S. Exec. Doc. No. Confidential 10E, 25th Cong. 2d Sess., at 79 (March 26, 1838) ..... 12

Letter of Secretary of War John C. Calhoun to Jasper Parrish, Sub-Agent of the Six Nations, April 15, 1822, VII W. Hemphill, ed., *The Papers of John C. Calhoun, 1822-1823*, 43-44 (1973) ..... 10

In 1805, two bands of Oneidas – the pagan party and the Christian party – partitioned their lands in New York between them, and exchanged 100 acres with Cornelius Dockstader, an Oneida Indian, for a house and a barn. In 1807, Dockstader sold that land to Peter Smith, a non-Indian. (CA 407-15).[1] For nearly 200 years thereafter, that land – including the properties at issue here (the "Properties") – remained in possession of non-Indians, freely alienable and subject to state and local jurisdiction, taxation and services. Respondent Oneida Indian Nation of New York ("Respondent") purchased the Properties in 1997 and 1998.

Respondent argues that, throughout the 190 years that the Properties were under non-Indian ownership, possession and control, it held aboriginal title – the then-current right to possess, occupy and use the Properties – and that such aboriginal title is the basis for tax-exempt status of the Properties. (Respondent's Brief ("Resp. Br."), *passim*). That is wrong for several reasons.

First, under the equitable doctrines invoked by this Court in *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926) ("*Yankton Sioux I*") and *Felix v. Patrick*, 145 U.S. 317 (1892), long before 1997, Respondent could no longer compel ejectment to restore itself to possession, occupancy and use of the Properties. *A fortiori*, no current right to possession, occupancy and use – aboriginal title – existed in 1997.

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[1] Citations to CA __ are to the joint appendix in the Court of Appeals. New York State did not cause or control the 1805 and 1807 conveyances. Rather, the State's only nexus to these transactions was an omnibus 1807 "Act Relative to Indians." (CA 412-13). The federal government, clearly on notice of the conveyances, did not voice any objection to them. *See Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373 (1978).

Second, the Oneidas' aboriginal title to the Properties was terminated by the exercise of New York State's right of extinguishment and preemption in the 1788 Treaty of Fort Schuyler. Third, extinguishment of the Oneidas' aboriginal title to the Properties was confirmed by the 1838 Treaty of Buffalo Creek. 7 Stat. 550. Fourth, for decades in the nineteenth and early twentieth centuries, the Oneidas abandoned their tribal status, extinguishing any surviving aboriginal title to the Properties.

Finally, Respondent has not satisfied the criteria set forth in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), to support the necessary finding that the Properties are (or ever were) Indian country under 18 U.S.C. § 1151. Thus, the Properties are not exempt from taxation.

## I. THE EXTRAORDINARY PASSAGE OF TIME AND THE CHANGE IN THE CHARACTER OF THE PROPERTIES EXTINGUISHED ABORIGINAL TITLE

When Respondent was previously before this Court – in connection with its claim for "damages for the occupation and use of tribal lands allegedly conveyed unlawfully in 1795" over the express objection of the federal government – all nine Justices agreed that "[o]ne would have thought that claims dating back more than a century would have been long ago barred." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 229, 236, 253 (1985) ("*Oneida II*"); *id.* at 255 *et seq.* (Stevens, J., dissenting). The Court nevertheless concluded that it had not been presented with a legal basis for barring Respondent's damage claim. *Id.* at 236, 253. The Court did not reach the "question of whether equitable considerations should limit the relief available to the present day Oneida Indians" (*id.* at 253 n.27) and four Justices dissented and would have barred even the damage claim on laches grounds. *Id.* at 255 *et seq.* (Stevens, J., dissenting).



Respondent now seeks recognition of a right in 1997 and 1998 to exercise aboriginal title – the present right of possession, occupancy and use – in lands conveyed in 1805. Here, there is a sound legal basis in the time-based principles of equity to hold that Respondent's claim is "barred by the extraordinary passage of time." *Id.* at 256.

The foundation of Respondent's argument is that its original aboriginal title in former Oneida lands remained inchoate for 190 years and was revived upon Respondent's renewed occupancy of the Properties. Because aboriginal title is the current right of an Indian tribe to possess, occupy and use lands inhabited by that tribe at the time colonists arrived (*see, e.g., Oneida Indian Nation of New York State v. County of Oneida,* 414 U.S. 661, 667 (1974) ("*Oneida I*"); *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831)), Respondent's position is unsustainable. The extreme passage of time made it impossible to judicially restore Respondent to possession of the Properties in 1997-98. *Yankton Sioux I,* 272 U.S. at 357. As a result, aboriginal title – the current right of the Indians to possess, occupy and use the land – no longer existed. And that is so whether one frames the analysis in terms of impossibility (*Yankton Sioux I*, 272 U.S. at 357) or laches (*Oneida II)*, 470 U.S. at 260 (Stevens, J., dissenting)).

The concept of applying time-based equitable doctrines to resolve Indian title claims – as opposed to damage claims – is not novel. The impossibility doctrine was applied to an Indian title claim in *Yankton Sioux I.* Giving dispositive weight to the fact that, after the passage of more than 60 years, the lands had been developed by, and were "in the hands of innumerable innocent purchasers," this Court held that it would be impossible to rescind the cession of former Sioux lands and restore the Indians to their former

lands. 272 U.S. at 357. *Accord Felix v. Patrick*, 145 U.S. 317, 330 (1892) (laches barred Indians from reclaiming property settled, held and developed by non-Indians for 28 years); *See also Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 462 (7th Cir. 1998) ("Because the Menominee can prove no set of facts under which they would be entitled to exercise aboriginal rights, this claim [to exercise such rights in their former reservation lands] was properly dismissed").

Invoking *Yankton Sioux I*, 74 years later the District Court in *Oneida Indian Nation of New York v. County of Oneida, New York*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000) ("*Oneida III*") squarely rejected Respondent's bid to exercise current possessory rights over former reservation lands and denied as futile its motion to amend its complaint to add a claim for ejectment. As the court explained, the equitable considerations that were determinative in *Felix* and *Yankton Sioux I* are "magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries." *Id.*

This case is ripe for application of such time-based principles of equity. Moreover, application of time-based equitable considerations will allow a pragmatic resolution of the Oneidas' current land rights, without necessarily barring the tribe's claims under the Indian Trade and Intercourse Act, 25 U.S.C. § 177. Furthermore, if Respondent seeks a homeland – and not merely tax advantages and commercial ventures such as its Turning Stone casino and those operating on the Properties – it may petition the federal government pursuant to 25 U.S.C. § 465 to restore certain lands to trust status. *See Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 (1998). Thus, the application in this case of time-based principles of equity, will "maintain the proper measure of flexibility to protect the legitimate interests of the tribes, while at the same time



honoring the historic wisdom in the value of repose." *Oneida II*, 470 U.S. at 262 (Stevens, J., dissenting).

## II. THE TREATY OF FORT SCHUYLER EXTINGUISHED ABORIGINAL TITLE

In Article I of the Treaty of Fort Schuyler, the Oneidas expressly ceded "all of their lands to the people of the State of New York forever," thus unambiguously terminating aboriginal title to all lands then claimed by the tribe. At the time of the Treaty, New York State had the right of preemption and the sole power to extinguish the aboriginal rights of the Indians residing within its borders. *Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1160, 1167 (2d Cir. 1988) ("*Oneida 1988*"); *Oneida I*, 414 U.S. at 667 (right to terminate aboriginal title became the province of the federal government only when the federal Constitution became effective).

Respondent strains to read Article II of the Treaty as "immediately qualify[ing]" the cession of all Oneida lands provided for in Article I, and argues that the Oneidas actually "reserved" the lands to themselves and "retained the right of perpetual possession." Resp. Br. at 20. That reading is inconsistent with the plain language of Article II and of the Treaty read as a whole. Far from "qualifying" the cession in Article I, Article II is a comprehensive provision in which New York State (i) grants land to two individuals; (ii) sets aside a reservation for the Oneidas; and (iii) affirms the continued rights of two other Indian tribes to live in settlements established on certain of the ceded Oneida lands. Further, New York State retained the right and discretion to construct public works on portions of the reserved land and the State retained the jurisdiction, power and duty to pass laws to protect and enforce the Indian's right to make leases and collect rents, and to "prevent frauds on them respecting the same."

There is no aspect of Article II, read in its entirety and in context, which supports Respondent's contention that the Oneida's carved out (or "reserved") the lands for (or to) themselves.[2] Indeed, the Article II set-aside of the reservation lands is twice characterized as a "reservation *to* the Oneidas" (not "*by* the Oneidas"). *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Thus, the Treaty of Fort Schuyler terminated aboriginal title to the Properties.[3]

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[2] None of the cases cited by Respondent supports its interpretation of the treaty, among other reasons, because none of the cases concern the Treaty of Fort Schuyler or any other treaty made by one of the original 13 states during the time in which the state held the right of preemption. *See United States v. Klamath and Moadoc Tribes,* 304 U.S. 119 (1938) (citing 16 Stat. 707 (1866)) (cession in federal treaty qualified by set aside in same article); *United States v. Winans*, 198 U.S. 371, 378 (1905) (Article III "further secured" right of Indians to fish beyond reservation boundaries "in common with citizens of the territory"); *The Kansas Indians*, 72 U.S. 737, 755 (1866) (treaty effecting division of Indian territory into reservation held in common and separate estates held in severalty "could never have been intended by the government to make a distinction in favor of Indians who held in common, and against those who held in severalty.")

Respondent's reliance on opinion letters by Attorneys General Taney and Bradford is likewise misplaced. Resp. Br. at 21. Neither was rendered in the context of a contested dispute. The Taney opinion only responded to whether the lands in question were subject to restraints on alienation. The Bradford opinion was ignored by the federal government, which proceeded to make only a "pretense of interfering" with New York's 1795 purchase of Oneida land only a few months later, and "[was] not seriously concerned over the illegality of the purchase of Oneida lands...." *Oneida Indian Nation of New York v. United States,* 43 Ind. Cl. Comm. 373, 384-385 (1978).

[3] Respondent desperately argues that New York did not have the right of preemption in 1788 because the Treaty of Fort Schuyler was signed after the effective date of the Constitution. Resp. Br. at 25-26. That is wrong; the Constitution was effective March 4, 1789. Indeed, this argument has been fully litigated (twice) by Respondent and conclusively rejected by the Second Circuit, holding that New York's right to enter



## III. THE TREATY OF BUFFALO CREEK ALSO EXTINGUISHED ABORIGINAL TITLE OVER THE PROPERTIES

To the extent that the Treaty of Fort Schuyler did not terminate the Oneidas' aboriginal title in New York, as shown in Petitioner's Brief, and in briefs submitted by its *amici*, the Treaty of Buffalo Creek extinguished the Oneida reservation in New York. However, regardless of whether the Treaty of Buffalo Creek extinguished Indian title to the Oneida reservation in its entirety, it is beyond peradventure that the Treaty extinguished (or confirmed the extinguishment of) aboriginal title in all lands ceded before 1838, including the Properties.

### A. The Treaty of Buffalo Creek Diminished the Oneida Reservation

The Treaty of Buffalo Creek was one of a series of treaties in which the federal government arranged for the New York Indians, including the Oneidas, to remove from New York to the west.[4] The federal government encouraged removal to free the maximum amount of Oneida land in New York for settlement. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 346 (1998) ("*Yankton Sioux II*") (examining the context and "common understanding of the time" necessary for "sensible construction of treaties"). *See also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

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into, and the effect of, the Treaty of Fort Schuyler is assessed under the Articles of Confederation. *Oneida 1988*, 860 F.2d at 1148 *et seq.*; *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982).

[4] *E.g.*, Treaty with the Chippewa, 7 Stat. 303 (1827); Treaties with the Menominee: 7 Stat. 342 (1831); 7 Stat. 405 (1832); 7 Stat. 506 (1836).

Article 13 of the Treaty of Buffalo Creek provides that the Oneidas will remove to the reservation in Kansas upon making "arrangements with the Governor of the State of New York for the purchase of their lands." 7 Stat. 550, Article 13. As a result, at the very least, the Treaty of Buffalo Creek expressly contemplated the diminishment of the Oneida reservation from 5,000 acres (then held by the Oneidas) as a result of such sales. Those authorized sales resulted in a diminishment of the land held by the Oneidas in New York down to 32 acres.

Having authorized (at the very least) the diminishment of the Oneida reservation below 5,000 acres, the only question is what the Treaty contemplated with respect to the 295,000 acres that had already been sold and was being occupied, developed and used by non-Indians. Surely, the federal government and the Oneidas did not expect the Oneidas' lands to shrink from 5,000 acres to 32 acres, but allow Oneidas to return and reclaim reservation status on the 295,000 acres previously sold. Any other result ignores the express terms of the treaty, the contemporary historical context, subsequent references to the reservation and demographic trends. *Yankton Sioux II*, 522 U.S. at 343-46; *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 445-48 (1975); *Solem v. Bartlett*, 465 U.S. 463, 468-71 (1984); *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 604-05 (1977). This Court should give the Treaty of Buffalo Creek a sensible construction that avoids an absurd conclusion. *Yankton Sioux II*, 522 U.S. at 346.

Without exception, the record reflects either no Oneida reservation in New York thereafter or a small reservation of approximately 32 to 100 acres. *E.g., United States v. Boylan*, 265 F. 165 (2d Cir. 1920) (protection sought for 32 acres as Oneida land); Federal Annual Report of the Commissioner of Indian Affairs at 224 (1903) (New York Oneidas "formerly had a reserve..."); Federal Annual Report



of the Commissioner of Indian Affairs at 314 (1891) ("The Oneida have no reservation, their lands having been divided in severalty among them by act of the legislature many years ago"); Federal Annual Report of the Commissioner of Indian Affairs at 288 (1906) (New York Oneidas have no reservation and can hardly be said to maintain a tribal existence; those listed on the rolls as "Oneidas at Oneida" are scattered families residing in Oneida and Madison counties and other parts of upstate New York). *See also Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 385 (1978). As a result, the Treaty of Buffalo Creek, at the very least, resulted in the diminishment of the Oneida reservation, by extinguishing reservation status to the 295,000 acres that had already been sold – including the Properties – and authorizing the sale of the balance to the State of New York.

### B. The Oneidas' Agreement to Remove From New York in the Treaty of Buffalo Creek is Inconsistent with Continued Oneida Sovereignty In New York

The Treaty of Buffalo Creek's creation of a new home for the Oneidas west of the Mississippi River cannot be squared with the continued existence of a more than quarter-million acre Oneida reservation in central New York that the Oneidas had largely vacated by 1838.

The history of the federal efforts prior to the Treaty of Buffalo Creek to remove the Oneidas from New York establishes that the Treaty's purpose was to complete the removal of the Oneidas from New York.[5] The Treaty recited that it was entered into pursuant to the Removal Act of 1830

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[5] In its brief in *Oneida II*, the United States concluded that "the Treaty obviously contemplated [the New York Indians'] complete removal from New York." *See* U.S. *Oneida II* Br. at 31 (No. 83-1065).

and was the culmination of more than 20 years of federal efforts to remove the Indians from New York. Treaty of Buffalo Creek, 7 Stat. at 550-551; Act of May 28, 1830, 4 Stat. 411. Members of the Oneida and other tribes acknowledged before 1838 that both the Indians and the United States intended "to relieve the State of New York of its entire Indian population." See New York Br. at 5-6.

Moreover, in 1832, representatives of Oneidas and others, who had recently removed from New York to Wisconsin, formally accepted and urged ratification of the federal treaties pursuant to which the Menominees agreed to set aside 500,000 acres in Wisconsin as a home for the Oneidas and other New York Indians, stating that the Wisconsin acreage was sufficient "to answer all the wants of the New York Indians." Treaty with the Menominee, Oct. 27, 1832, 7 Stat. 405, 409 App. (emphasis added). Whatever rights the New York Oneidas had in the Wisconsin lands at the time of the Treaty of Buffalo Creek in 1838 derived from those earlier treaties, which were intended to meet all of their land needs.[6] In furtherance of the federal removal policy, nearly half the Oneidas had sold their lands to New York and removed to Wisconsin by the time of the Treaty of Buffalo Creek in 1838. Treaty of Buffalo Creek, Sch. A, 7 Stat. at 556 (census listed 600 Oneidas in Wisconsin and 620 in New York).

As we have previously established (Petitioner's Brief ("Pet. Br.") at 6-8; New York Br. at 8-9), the Treaty of

[6] Secretary of War Calhoun's 1818 statement that President Monroe would not consider lands acquired in the west to be in exchange for the Six Nations' present lands (Cayuga Br. at 11, 25), was modified in 1822, when Calhoun advised an Oneida faction that the Six Nations should voluntarily dispose of their New York lands and remove to Wisconsin. *See* Letter of Secretary of War John C. Calhoun to Jasper Parrish, Sub-Agent of the Six Nations, April 15, 1822, VII W. Hemphill, ed., *The Papers of John C. Calhoun, 1822-1823*, 43-44 (1973).



Buffalo Creek continued the Oneida removal process, providing a "permanent home" west of the Mississippi River in what is now Kansas for "all the New York Indians," where the Oneidas were to exercise all tribal governmental powers. Arts. 2, 4, 7 Stat. at 551-552. Contrary to the arguments of Respondent and its *amici*, the Treaty of Buffalo Creek was more than a swap of Wisconsin land for land in Kansas. (Resp. Br. at 4-5; U.S. Br. at 18; Cayuga Br. at 12). As this Court held in *New York Indians*, "[p]robably . . . the main inducement" for the United States to set aside new lands for the New York Indians in the Indian territory was their agreement "to remove beyond the Mississippi." *New York Indians v. United States*, 170 U.S. 1, 15 (1898); U.S. *Oneida II* Br. at 31.

Contrary to the argument of Respondent and the United States (Resp. Br. at 41, U.S. Br. at 22-23), the Oneidas' agreement to remove was the bargain that this Court enforced in *New York Indians*. The Court quoted the Oneidas' agreement in Article 13 of the Treaty – "to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida" – in support of its holding that the Oneidas had timely "accept[ed] and agree[d] to remove to the [Kansas] country set apart for their new homes" and that their failure to occupy it in large numbers did not forfeit the new reservation under Article 3 of the Treaty. *New York Indians*, 170 U.S. at 26, 24; Treaty of Buffalo Creek, Arts. 3, 13, 7 Stat. at 552, 554.

### C. No Language of Cession Was Necessary to Terminate Oneida Sovereignty Over Their Former New York Lands

The absence of language of cession in the Treaty is irrelevant. New York, which had the exclusive right to purchase Oneida lands, was not a party to the Treaty. The

United States, which was a party to the Treaty, had no right to acquire Oneida lands. *See Oneida I*, 414 U.S. at 670 (original 13 states held the preemptive right to Indian lands within their boundaries).[7] Moreover, the Oneidas had previously left all but 5,000 acres of their reservation land pursuant to the ongoing Oneida removal process that the United States had encouraged and facilitated. As to those lands, both the Oneidas and the United States would have understood that no cession was required. Accordingly, the Treaty provided simply that the Oneidas would sell their remaining lands to New York and then remove.

The Treaty resulted in a cession of jurisdiction even in the absence of explicit cession language. *See Hagen v. Utah*, 510 U.S. 399, 411-12 (1994) (specific cession language not required); *Yankton Sioux II*, 522 U.S. 329, 344 (1998). Rather, as we have shown (Pet. Br. 38-39), the Oneidas' acceptance of, and agreement to remove to, a new reservation that was to serve as their homeland released and relinquished their tribal sovereignty over their former New York lands; this relinquishment "was tantamount to an extinguishment by voluntary cession." *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 358 (1941) (internal quotation omitted).[8]

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[7] United States treaty negotiator Ransom Gillet knew that New York – and not the United States – had the exclusive right to purchase Indian lands in central New York. See Letter from R.H. Gillet to C.A. Harris, Commissioner of Indian Affairs, S. Exec. Doc. No. Confidential 10E, 25th Cong. 2d Sess. (March 26, 1838) (stating that New York State has the exclusive right to purchase Onondaga lands); *See also Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 404 (1978) (Gillet recognized that Oneidas would have to make a treaty with New York to sell their lands). Thus, this Court should reject the argument of *amici* Cayuga Nation, et al., that the absence of treaty language ceding Oneida land to the United States meant that the Treaty of Buffalo Creek was not a removal treaty. (Cayuga Br. at 22-25).

[8] Respondent's assertion (Resp. Br. at 39) that we may not rely upon *Santa Fe* is meritless. *Santa Fe* plainly supports an argument that is



That most of the New York Oneidas did not occupy the Kansas reservation and that the United States eventually sold it for settlement by others (Resp. Br. at 40) does not change the result. In *Santa Fe*, although only a few Indians moved to the new reservation created for them by the federal government, this Court nevertheless found intent to terminate the pre-existing reservation based on an "indication" that the Indians were satisfied with the newly created reservation. 314 U.S. at 357. Here, there is far more than an indication: the Oneidas entered into a federal treaty agreeing to remove to a new reservation and later recovered the value of the new reservation in this Court. Having bargained for, and accepted the benefit of, the new reservation, the Oneidas cannot now disclaim the effect of their agreement. *See Cass County*, 524 U.S. at 110 (cession of jurisdiction permits taxation).

### D. There Was No Promise To The Oneidas That Their New York Reservation Would Continue After They Sold Their Lands to the State and Removed from New York

The statement apparently made to the Oneidas by United States treaty negotiator Ransom Gillet, relied upon by Respondent and the United States (Resp. Br. at 35-36, U.S. Br. at 20-22), at most assured the Oneidas that they would not be forcibly removed from their 5,000 acres before they sold these lands to New York pursuant to Article 13 of the Treaty. JA 146 (reference to "lands where they reside" and statement that Oneidas could "remain where they are forever"); *see* New York Br. at 25-27; Lenox, et al. Br. at 29-30. Notably, Gillet did not promise the Oneidas that the 5,000 acres would retain reservation status after they sold the land to New York and removed from the State.

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fairly included within the third question presented. Moreover, *Santa Fe* was argued by New York State as *amicus curiae* to the Second Circuit and in this Court in support of the petition for certiorari.

More importantly, Gillet did not promise that the lands the Oneidas had sold before 1838 would retain reservation status following the Treaty of Buffalo Creek; there is nothing in his statement or the surrounding circumstances that could be so construed. To the contrary, "[t]hose lands [that the Oneidas no longer occupied in 1838] not only were notoriously claimed by others – the white settlers who had moved into the area by 1838; they had been sold by the Oneidas themselves for disposition to white settlers." U.S. *Oneida II* Br. at 32 (internal quotes omitted). Accordingly, Gillet's statement does not conflict with the interpretation that the Treaty disestablished the portion of the reservation that the Oneidas had sold before 1838 and also ended the reservation status of the remaining portions of the reservation as the Oneidas sold them to New York and removed following the proclamation of the Treaty.

### E. The Treaty Of Buffalo Creek Did Not "Fail"

The aftermath of the Treaty belies Respondent's claim (Resp. Br. at 38; *see* Cayuga Br. at 27-29) that the Treaty "failed." This Court enforced the Treaty in *New York Indians*, awarding the Oneidas the value of their Kansas lands. 170 U.S. at 36. Importantly, although few Oneidas removed to the Kansas reservation, the Oneidas remaining in New York in 1838 sold nearly all of the remaining 5,000 acres to New York during the 1840s and most of them removed from the State. *See* New York Br. at 10; Federal Annual Report of the Commissioner of Indian Affairs at 341 (1892) (most of the Oneidas removed to Wisconsin in 1846; the few who remained kept about 350 acres of land, which dwindled through subsequent sales to about 100 acres). Thus, as the Oneidas sold their remaining lands to New York and removed, the Treaty diminished the remaining reservation *pro tanto*. Even if a small remnant of an Oneida "reservation" remained at the end of the nineteenth century, which we do not concede, it did not include the Properties.



Additionally, Respondent erroneously downplays the fact that the former Oneida reservation area has been governed by the State and local governments for over 160 years. (Resp. Br. at 40-41). The history of the area after the Treaty's proclamation is uniformly consistent with the understanding that reservation status over the lands previously sold had ended. The sales that followed the Treaty of Buffalo Creek were made pursuant to the authorization contained in Article 13. Accordingly, over 160 years of state and local jurisdiction over the area and its now almost exclusively non-Indian population further demonstrate that both the Oneidas and the United States intended that the Oneidas' tribal sovereignty and jurisdiction were terminated over the lands they vacated both before and after the Treaty.

## IV. ABORIGINAL TITLE CEASES WHEN TRIBAL STATUS IS ABANDONED

The conclusion reached by the Second Circuit and advocated by Respondent – that present Bureau of Indian Affairs ("BIA") recognition is sufficient to judicially establish that tribal status was never abandoned – is incorrect as a matter of law. Present tribal recognition by the political branches of government is not dispositive of whether a tribe has previously abandoned tribal status; that determination of continuous tribal existence for land rights purposes is the province of the judiciary. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57-58 (2d Cir. 1994) ("*Paugussett*").[9]

In order to assert aboriginal rights in the Properties, Respondent must meet a four factor test: That (1) it is an Indian tribe; (2) the land is tribal land; (3) the United States has never consented to the alienation of the land; and (4) the

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[9] *See also* Brief of Amicus Curiae Cayuga and Seneca Counties, In Support of Petitioner, at 11-13.

trust relationship has not been terminated or abandoned. *Paugussett*, 39 F.3d at 56; *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004). Determination of tribal status by the BIA at most addresses issue (1); it does not address issue (4) – that is, whether the Oneidas abandoned tribal status.

That is particularly the case with respect to Respondent, which was recognized as a tribe before the Department of Interior promulgated regulations in 1978 establishing standards and a procedure for acknowledging Indian tribes. 25 C.F.R. §§ 83.1-83.13. Prior to 1978, federal tribal determinations were on an *ad hoc* basis. *Paugussett*, 39 F.3d at 57. Thus, whether the determination of tribal status "for all federal purposes" is a political question (Resp. Br. at 43-45) is (i) irrelevant to the issue at hand; and (ii) not conclusive (or entitled to judicial deference) since the determination with respect to Respondent was *ad hoc* and not pursuant to any governing factual standard.

Moreover, making the factual determinations necessary to establish or rebut an Indian land claim is not a political question. Courts – and not the BIA – are required to make such determinations. *See Seneca Nation*, 382 F.3d at 258; *Paugussett*, 39 F.3d at 58. Indeed, this Court in *Oneida II* observed that issues involved in such decisions are not political questions. 470 U.S. at 249 (that Congress has plenary power in Indian affairs does not make litigation involving such matters nonjusticiable political questions).

Respondent disingenuously suggests that Sherrill does not claim that the Oneidas ever abandoned tribal status. (Resp. Br. at 45). That ignores the entire course of this litigation, throughout which Sherrill contended that there was a disputed issue of fact requiring discovery – including discovery of oral Indian lore – and trial concerning whether



the Oneidas abandoned tribal status in New York State for decades during the second half of the nineteenth century and the early decades of the twentieth century. Indeed, the abandonment argument was addressed extensively by Judge Van Graafeiland in his dissent below and in Sherrill's brief on the merits. *See Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 171 (2d Cir. 2003), *et seq.*; Pet. Br. at 41-46.[10]

As we previously demonstrated (Pet. Br. at 41-46), substantial record evidence precluded summary judgment on the issue of abandonment of tribal status by the New York Oneidas. Respondent cannot avoid the impact of that evidence on its assertion that aboriginal title survived.

## V. UNDER THIS COURT'S DECISION IN *VENETIE* AND 18 U.S.C. § 1151, THE PROPERTIES ARE NOT INDIAN COUNTRY

Sherrill has previously shown that the Properties are not Indian country under 18 U.S.C. § 1151 because the land was neither set aside by the federal government for the use of the Indians as such, nor has it ever been federally superintended. (Pet. Br. at 17-31). *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998); *United States v. Pelican*, 232 U.S. 442, 449 (1914); *Cass County*, 524 U.S. at 114-115.

Remarkably, Respondent's Brief is bereft of any analysis under section 1151, as are the briefs of the myriad *amici* supporting Respondent's position. In place of such analysis, Respondent takes the position that because the Properties once had been part of the Oneidas' reservation, by

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[10] *United States v. John*, 437 U.S. 634, 652 (1978), which Respondent argues is "most pertinent" and preclusive of Sherrill's assertion of abandonment (Resp. Br. at 46), is inapposite because it addressed a mere lapse in federal tribal recognition, and not a tribe's abandonment of tribal status.

definition, they are Indian country and exempt from taxation once restored to Indian possession. *See, e.g.*, Resp. Br. at 13. However, as this Court has held, the mere denomination of land as "trust land" or a "reservation" does not elevate it to Indian country status, *E.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); and the mere repurchase of land which was previously a reservation does not return it to Indian country status. *Cass County*, 524 U.S. at 115.

### A. Federal Superintendence

There is no dispute (i) that the Oneidas' New York reservation was superintended exclusively by New York State and/or local authorities since its creation in 1788, or (ii) that the federal government never objected to New York's jurisdiction over these lands, much less sought to assume control for itself. This fact, without more, mandates a finding that the Properties are not, and never were, Indian country.[11]

Far from actively controlling the New York Oneidas and their alleged reservation, the federal government deferred

[11] Respondent's only effort to overcome the unassailable absence of federal superintendence is a footnote in which Respondent (i) summarily dismisses *Venetie*'s requirement of federal superintendence; and (ii) argues that there is "ample evidence of federal involvement with respect to the Oneida and their land." Resp. Br. at 17 n.2 (emphasis added). Respondent's position ignores the unequivocal teaching of *Venetie* and its predecessors that expressly require active federal control over the land in question – and not mere political dependence on the federal government or Indian Trade and Intercourse Act protection – to satisfy the Indian country requirement of federal superintendence. *Venetie*, 522 U.S. at 530 n.5, 533; *United States v. Sandoval*, 231 U.S. 28, 47 (1913)) (pattern of federal stewardship and treatment of the land in question as "dependent" for many years); *See also Blunk v. Arizona Dept. of Transp.*, 177 F.3d 879, 883 (9th Cir. 1999); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993), *cert. denied*, 510 U.S. 994 (1993).



to the State's control over the Indians and their lands. *See* Federal Annual Report of the Board of Indian Commissioners at 337 (1917) (New York had exercised police jurisdiction over New York Indians for more than a century; "The Federal Government does not attempt to police the reservations," and "heartily approve[s] of the steps taken by State of New York to maintain law and order on the reservations"); Federal Annual Report of the Board of Indian Commissioners at 98-99 (1920) (State jurisdiction, involvement in health, welfare, highways, and education over Indian lands constituted "the habit and practice of a century"). *See also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980) (stating that "the federal government repeatedly disclaimed any responsibility for managing the affairs of the eastern tribes.") (citations omitted).

Accordingly, because it is undisputed that the Properties were never federally superintended, they are not Indian country under 18 U.S.C. § 1151.

### B. New York State, And Not The Federal Government, Set Aside The Oneida Reservation At Issue

The Properties are also not Indian country because the Oneida reservation at issue was set aside by New York State in 1788, and not by the federal government in the Treaty of Canandaigua. 7 Stat. 44 (merely "acknowledging" reservation set aside by state). The fact that the Oneidas' reservation was established "under treaties with the State, which never surrendered to the General Government any of its rights of sovereignty" (Federal Annual Report of the Commissioner of Indian Affairs at 224 (1903)), was repeatedly confirmed over the years by the United States in Annual Reports of the Commissioners of Indian Affairs, including those lodged by Respondent. *See, e.g.*, Federal Annual Report of the Commissioner of Indian Affairs at 685

(1871) (Oneida Indian reservation in New York exists "By arrangement with the State of New York"); Federal Annual Report of the Commissioner of Indian Affairs at 16 (1872) (Oneida reservation provided for by treaty stipulation between the Indians and the State of New York). *See also Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (interpreting Treaty of Fort Schuyler, observing that "in September 1788, we have the remarkable fact of the Oneidas ceding the whole of their vast territory to the people of this state, and accepting a retrocession of a part, upon restricted terms . . . ;") (emphasis added); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (noting pre-Constitution New York State treaties in which tribes ceded all lands to State receiving limited "grants in which they admit all dependence").

## CONCLUSION

For all of the foregoing reasons and the reasons previously set forth, the judgment of the court of appeals should be reversed.

November 18, 2004

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No. 03-855

# In the Supreme Court of the United States

CITY OF SHERRILL, NEW YORK, PETITIONER

*v.*

ONEIDA INDIAN NATION OF NEW YORK, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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## QUESTIONS PRESENTED

In 1997 and 1998, respondent Oneida Indian Nation of New York (OIN) purchased certain parcels of property in Sherrill, New York, through open market transactions. Those parcels are situated within the boundaries of the Oneida Indian Reservation as defined by the 1794 Treaty of Canandaigua but had been acquired from the Oneidas without the consent of the United States. The instant case involves a dispute between the OIN and petitioner City of Sherrill regarding the susceptibility of the tracts to state and local taxation. The questions presented are as follows:

1. Whether the Treaty of Canandaigua established a federal reservation and exempted the relevant lands from state and local taxation.

2. Whether the federal reservation created by the Treaty of Canandaigua was disestablished by the 1838 Treaty of Buffalo Creek.

3. Whether the OIN, as a sovereign Tribe and a successor-in-interest to the Oneida Nation (a party to the Treaty of Canandaigua), may assert the statutory and treaty rights of its predecessor Tribe.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

### INTEREST OF THE UNITED STATES

The United States has a substantial interest in the interpretation of federal treaties and statutes protecting Indian interests, the proper resolution of issues concerning the recognition of Indian Tribes, and the exercise of governmental authority in Indian country and over Indian lands. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

### STATEMENT

1. a. Respondent Oneida Indian Nation of New York (OIN) is a federally-recognized Indian Tribe and a direct descendant of the Oneida Indian Nation (Oneida Nation), a member of the Six Nations of the Iroquois Confederacy. The Oneida Nation's aboriginal homeland comprised some six million acres in what is now east-central New York. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230-231 (1985) (*Oneida II*); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 664 (1974) (*Oneida I*).

After the Revolutionary War, the United States entered into the Treaty of Fort Stanwix of October 22, 1784, with the Six Nations. 7 Stat. 15. That Treaty gave peace to the four

Nations that had sided with the British during the Revolutionary War, and it provided that the Oneida and Tuscarora Nations—which had sided with the colonists—"shall be secured in the possession of the lands on which they are settled." Arts. 1, 2, 7 Stat. 15. In the 1788 Treaty of Fort Schuyler with the State of New York, the Oneida Nation agreed to "cede and grant all their lands to the people of the State of New York forever." Pet. App. 136a. The Treaty further provided, however, that the Oneidas would "hold to themselves and their posterity forever" a specified tract of approximately 300,000 acres near Oneida Lake. *Id.* at 137a; see *Oneida II*, 470 U.S. at 231 ("[t]he Oneidas retained a reservation of about 300,000 acres").

b. In 1790, Congress passed the first of the Trade and Intercourse Acts (also known as the Nonintercourse Acts), which have long embodied essential features of federal Indian policy. Ch. 33, 1 Stat. 137. Section 4 of the 1790 Act provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138. The substance of that prohibition was carried forward by Congress in the Trade and Intercourse Acts of 1793, 1796, 1799, 1802, and 1834, and it remains in effect today. See *Oneida I*, 414 U.S. at 668 & n.4; 25 U.S.C. 177.

c. On November 11, 1794, the United States and the Six Nations entered into the Treaty of Canandaigua. 7 Stat. 44 (Pet. App. 141a-146a). In Article 2 of the 1794 Treaty, the United States "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property." Pet. App. 141a. Article 2 further provided that "the United States will never claim the same, nor disturb" the Nations "in the free use and enjoyment" of those lands, and that "the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Ibid.*; accord *id.* at 142a (Art. 4). The United States also promised to expend $4500 annually for clothing and other goods for the Six Nations. *Id.* at 143a (Art. 6). The Six Nations in turn agreed that they would "never claim any other lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof." *Id.* at 142a-143a (Art. 4).



In 1795, the State of New York—without federal approval—negotiated directly with the Oneida Nation to purchase some of the Oneidas' remaining lands. *Oneida II*, 470 U.S. at 232. Both Secretary of War Pickering and Attorney General Bradford warned New York officials that title to the Six Nations' land could be extinguished only by a treaty entered into under the authority of the United States. *Ibid.*; Resp. Br. in Opp. App. 1a-4a. Despite those warnings, the State repeatedly purchased land from the Oneida Nation, without federal authorization, during the late eighteenth and early nineteenth centuries. See Pet. App. 9a; *Oneida II*, 470 U.S. at 232. By 1838, the Oneida Nation retained only approximately 5000 of the 300,000 acres secured to it by the Treaty of Canandaigua. Pet. App. 13a.

d. Between 1810 and 1816, the Six Nations purchased substantial quantities of land in Wisconsin from the Menomonee and Winnebago Tribes. *Id.* at 10a & n.8; *New York Indians* v. *United States*, 170 U.S. 1, 11-14 (1898) (*New York Indians II*). The relevant terms of purchase ultimately "were memorialized in a treaty between the federal government and the Menominee in 1831, to which the New York Indians gave their assent in 1832." Pet. App. 10a n.8; see Articles of Agreement, Feb. 8, 1831, U.S.-Menomonee Tribe, 7 Stat. 342. Although several hundred Oneidas moved to Wisconsin during the 1820s, approximately 620 Oneidas remained in New York as of 1838. Pet. App. 10a, 13a.

In 1838, the United States and several Tribes of New York Indians entered into the Treaty of Buffalo Creek.

7 Stat. 550 (Pet. App. 147a-178a). The New York Indians agreed to "cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831," with the exception of a specified tract there on which some New York Indians then resided. *Id.* at 149a (Art. 1). "In consideration of the above cession and relinquishment," the United States agreed to "set apart" a tract of approximately 1.8 million acres in the Indian Territory, in what is now the State of Kansas, "as a permanent home for the New York Indians." *Ibid.* (Art. 2); *New York Indians II*, 170 U.S. at 15; Pet. App. 12a. The vast majority of Oneida Indians residing in New York and Wisconsin, however, ultimately refused to relocate to Kansas. *Id.* at 13a. The reservation set aside for them in Kansas pursuant to the 1838 Treaty therefore was restored to the public domain and later disposed of by the United States. *Id.* at 14a-15a.

e. In 1970, the OIN filed suit in federal district court, seeking damages for the fair rental value, during the period between January 1, 1968, and December 31, 1969, of certain parcels conveyed by the Oneidas to the State of New York in 1795. See Pet. App. 15a-16a; *Oneida II*, 470 U.S. at 229. The gravamen of the suit was that the 1795 transaction had not been approved by the federal government, as required by the Trade and Intercourse Act of 1793, and that the sale was therefore void under the terms of that Act. *Ibid.* This Court in *Oneida II* affirmed the determinations of the lower courts that the defendant counties were liable under federal common law for their wrongful possession of the relevant lands. See *id.* at 230, 253. The Court noted, however, that Congress remained free to enact legislation resolving Indian land disputes, *id.* at 253, and it left open the possibility that equitable considerations might limit the relief available to the OIN in the absence of congressional action, *id.* at 253 n.27. Litigation regarding additional claims brought by the OIN and other New York Tribes, premised on the State's allegedly unlawful acquisition of tribal land, remains ongoing.



See *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002); *Seneca Nation* v. *New York*, No. 02-6185, 2004 WL 2008521 (2d Cir. Sept. 9, 2004); *Cayuga Indian Nation* v. *Pataki*, No. 02-6111(L) (2d Cir. argued Mar. 31, 2004).

f. In 1997 and 1998, the OIN purchased in open market transactions from non-Indians fee simple title to certain parcels of land in the City of Sherrill, New York. Pet. App. 2a. Those parcels are within the historical boundaries of the 300,000-acre reservation secured by the Treaty of Canandaigua. *Id.* at 8a n.5, 19a, 85a, 90a-91a. The tracts had been sold by the Nation to an individual Oneida Indian in 1805 and then reconveyed to a non-Indian in 1807. *Id.* at 3a n.3. Those sales were not authorized by the federal government as required by the Trade and Intercourse Acts. *Id.* at 43a-44a.

The OIN currently operates a gas station, convenience store, and textile facility on the parcels. Pet. App. 2a, 64a. Petitioner City of Sherrill assessed property taxes against the parcels. After the Tribe refused to pay the property taxes, petitioner initiated proceedings against the Tribe to collect the taxes, purchased three of the parcels at a tax sale, and then commenced eviction proceedings. *Id.* at 65a-66a.

2. In 2000, respondent OIN brought this action against petitioner, alleging that the parcels described above are immune from state and local taxation, and seeking declaratory and injunctive relief. Pet. App. 73a. The district court granted summary judgment for respondents. *Id.* at 61a-133a. The court held that the parcels are within the boundaries of the Oneida reservation acknowledged by the 1794 Treaty of Canandaigua, *id.* at 85a, 90a-91a, and that Congress has never disestablished that reservation, *id.* at 100a. The court concluded that the land at issue here "is Indian Country and is not taxable by [local authorities]." *Id.* at 105a.

3. The court of appeals affirmed in relevant part. Pet. App. 1a-60a.

a. The court of appeals held that the parcels at issue are exempt from state and local taxation because they "are lo-

cated on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua." Pet. App. 24a. The court explained that "reservation land" is "by its nature * * * set aside by Congress for Indian use under federal supervision," and thus qualifies as Indian country under this Court's decision in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Pet. App. 24a. The court observed that, "when Indian land has been alienated in ways inconsistent with federal law, Indian title remains with the tribe." *Id.* at 27a. The court then explained that "[t]he Indian-country status of the alienated land is irrelevant for tax purposes when non-Indians hold fee title, since they pay state taxes," but that "when the tribe holding Indian title reacquires former reservation land, both forms of title coexist." *Id.* at 27a-28a. In those circumstances, the court concluded, "the state cannot tax [the land] and the tribe can no longer legally alienate it, at least without federal approval." *Id.* at 28a.

b. The court of appeals rejected petitioner's contention that the 1838 Treaty of Buffalo Creek had disestablished the 1794 reservation. Pet. App. 33a-41a. The court found that "[n]othing in [the] text [of the Treaty of Buffalo Creek] provides 'substantial and compelling' evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation." *Id.* at 34a. Rather, the court explained, "[t]he focus of the Buffalo Creek Treaty * * * was the exchange of *Wisconsin* land—not New York land—for that in Kansas." *Id.* at 40a.

c. The court of appeals rejected petitioner's argument that the parcels at issue here have lost their federally-protected status because the OIN has not existed continuously since the establishment of the reservation. Pet. App. 42a-45a. The court explained that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." *Id.* at 42a. The court also found that, "even if continuous tribal existence were required," the record demonstrates



that the Tribe has continuously existed as "a direct descendant of the original Oneida Indian Nation." *Id.* at 44a. Judge Van Graafeiland dissented on this issue, *id.* at 53a-60a, concluding that there are "significant, unresolved questions of fact as to whether the [OIN] has been in existence continuously over the last century and a half," *id.* at 60a.

## SUMMARY OF ARGUMENT

I. This Court's holding and analysis in *Oneida II* rested on the premise that the Oneidas' New York lands were subject to federal protection in 1795. That understanding was correct. Although the Oneidas ceded the bulk of their aboriginal lands to the State of New York in the 1788 Treaty of Fort Schuyler, they retained aboriginal title to a 300,000-acre parcel within which the tracts at issue here are located. In any event, regardless of the precise nature of the title held by the Oneidas as of 1788, the 1794 Treaty of Canandaigua secured the 300,000 acres as a federal reservation and guaranteed the Oneida Nation the "free use and enjoyment" of those lands. The tracts at issue in this case were therefore clearly immune from state and local taxation when they were sold by the Oneida Nation in 1805 and reconveyed to a non-Indian in 1807 without federal approval.

II. The 1838 Treaty of Buffalo Creek did not disestablish the reservation or abrogate the tax immunity secured by the Treaty of Canandaigua. The central bargain reflected in the 1838 Treaty was an exchange of most of the New York Indians' *Wisconsin* lands for property located in the Indian Territory. By the Treaty's plain terms, the Oneidas' obligation to remove to the West was contingent on their ability to "make satisfactory arrangements" for the sale of their New York lands. The negotiating history of the Treaty reinforces the natural reading of its text, since the Oneidas assented to the Treaty as finally adopted only after receiving express assurances from a federal commissioner that they would not be compelled to remove from their New York lands. This Court's decision in *New York Indians II* does not suggest

that the 1838 Treaty was intended to require removal or to disestablish the Oneidas' New York reservation. Rather, the award of damages in that case (and the New York Oneidas' receipt of a portion of that award) reflected the facts that the Treaty had effected an immediate cession of most of the Wisconsin lands, and that the Oneidas had not received the western lands promised them in return.

III. As this Court recognized in *Oneida II*, the OIN is a direct descendant of the Oneida Nation and is entitled to assert the rights of its predecessor. Decisions regarding tribal existence and recognition are entrusted to the political Branches. Congress has assigned responsibility for such decisions to the Department of the Interior, which has identified the OIN as a federally recognized Tribe and as a successor-in-interest to the Oneida Nation. The fragmentary materials identified by petitioner provide no legitimate ground on which a court could reject that determination.

## ARGUMENT

"The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985). "As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Ibid.* Absent federal authorization, the States and their political subdivisions are thus "without power to tax reservation lands." *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1998); see *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-112 (1998); *New York Indians*, 72 U.S. (5 Wall.) 761, 768-772 (1867) (*New York Indians I*) (holding that Seneca land protected by Treaty of Canandaigua was exempt from state taxation). And this Court has "consistently declined to find that Congress has authorized such taxation unless it has 'made its intention to do so unmistakably clear.'" *Cass County*, 524 U.S. at 110 (quoting *County of Yakima*, 502 U.S. at 258).



As we explain below, the tracts at issue in this case are within the boundaries of a federal reservation that was established by treaty in 1794. Since that time, Congress has neither authorized state or local taxation of the relevant lands nor disestablished the reservation. If the tracts had not been sold in violation of the Trade and Intercourse Acts, but instead had remained continuously in the Tribe's possession during the past two centuries, state and local taxation of the lands would clearly be barred by the 1794 Treaty, principles of tribal sovereignty, and federal supremacy over Indian affairs. The court of appeals' decision in this case thus provides the OIN with nothing more than the immunity from state and local taxation of its reservation lands that it would have possessed if the tracts had not been unlawfully alienated.

In *Oneida II*, this Court held that the OIN could assert a federal common-law cause of action against the current occupants of lands that were within the federal reservation established by the Treaty of Canandaigua and that were acquired by the State and private parties in violation of the Trade and Intercourse Acts. The Court left open the possibility, however, that the lower courts, in fashioning an appropriate remedy, might take into account the passage of time and the consequent legitimate expectations of subsequent purchasers. See 470 U.S. at 253 n.27. In subsequent lawsuits brought by the OIN and other New York Indian Tribes, based on allegations that tribal lands had been alienated in violation of the Trade and Intercourse Acts, substantial litigation has ensued concerning the manner in which those private interests should be balanced against the Tribes' interest in being restored to the positions they would have occupied if no breaches of law had occurred. See, *e.g.*, *Oneida Indian Nation* v. *County of Oneida*, 199 F.R.D. 61, 90-95 (N.D.N.Y. 2000) (based in part on equitable considerations, district court denies plaintiffs' request to author-

ize relief, including ejectment and monetary damages, from private landowners).[1]

Unlike the tracts involved in *Oneida II* and most of the tracts involved in those other subsequent lawsuits, however, the parcels at issue in the instant case were purchased by the OIN in arm's-length market transactions. That mode of acquisition effectively moots the concerns identified in *Oneida II* because it both protected the interests of innocent owners and ensured that the Tribe paid for the value of any improvements to the property. Petitioner's attempt to tax the OIN's own reservation lands, moreover, constitutes a particularly significant intrusion on tribal sovereignty and the federally protected status of the lands. See *County of Yakima*, 502 U.S. at 257-258 (explaining that, while States possess significant regulatory authority over reservation activities, the Court in the sphere of state taxation of reservation land has employed "a more categorical approach"). If the OIN, having reacquired reservation lands from willing sellers, is not entitled to regain the immunity from state and local taxation that it would have possessed if it had held the lands continuously, it is difficult to see what remedy for the prior wrongful alienation of those lands *would* be appropriate.

## I. THE LANDS AT ISSUE IN THIS CASE WERE IMMUNE FROM STATE AND LOCAL TAXATION AT THE TIME THEY WERE SOLD BY THE ONEIDA NATION IN 1805 AND RECONVEYED TO A NON-INDIAN IN 1807

Petitioner contends (Pet. 17-31) that the tracts at issue in this case were subject to state and local taxation even before

[1] The United States has taken the position that any relief in the land claims cases can and should come from the State of New York alone. See, *e.g.*, U.S. Second Amended Complaint (corrected) ¶ 2, *Oneida Indian Nation* v. *County of Oneida*, No. 74-CV-187 (N.D.N.Y. June 10, 2002) ("[P]rivate landowners are not parties to this action, and the United States does not seek any monetary or other relief from private landowners in the Subject Lands.").



they were sold by the Oneida Nation in 1805 and reconveyed to a non-Indian in 1807. Petitioner argues that (1) the 1788 Treaty of Fort Schuyler between the Oneida Nation and the State of New York extinguished the Tribe's aboriginal title to the lands; and (2) the 1794 Treaty of Canandaigua acknowledged the existence of a state reservation but did not establish a federal reservation or place the lands under federal protection. Those contentions lack merit.

### A. Petitioner's Argument Is Contrary To The Holding And Basic Premises Of This Court's Decision In *Oneida II*

In *Oneida II*, this Court held that the OIN had a valid federal common-law cause of action to vindicate its rights to land that had been acquired by the State of New York in 1795 without federal authorization. 470 U.S. at 233-236. The Court affirmed the determination of the court of appeals in that case that the current owners of the property were liable in damages for wrongful possession of the relevant tracts. *Id.* at 230, 253. The Court's analysis and holding rested on the premise that the Oneida Nation had federally protected title to those lands as of 1795, when the property was sold to the State, and that the sale was in violation of the Trade and Intercourse Acts.

The necessary implication of petitioner's legal theory, by contrast, is that the plaintiffs in *Oneida II* had no valid legal claim. Petitioner argues (Pet. 20-21) that the Oneida Nation's aboriginal title to the relevant lands was extinguished by the 1788 treaty with the State, and that the lands were never thereafter placed under federal protection. If those contentions were correct, there would have been no basis in *Oneida II* for treating the 1795 sale as violative of the Trade and Intercourse Acts, and hence no ground for holding that the OIN had a live cause of action under federal law based on that violation. Acceptance of petitioner's position would also render meaningless the substantial volume of subsequent litigation undertaken by the OIN and other Tribes in reliance on this Court's decision in *Oneida II*.

### B. Under The 1788 Treaty Of Fort Schuyler, The Oneida Nation Retained Aboriginal Title To The Lands At Issue In This Case

Petitioner contends that the 1788 Treaty of Fort Schuyler with the State of New York extinguished aboriginal title to all of the land (five and one-half million acres) that the Oneida Nation possessed at that time, while granting back to the Oneidas a 300,000-acre "state reservation." That reading of the 1788 treaty is incorrect. Properly construed, the 1788 treaty *excepted* the 300,000-acre portion of Oneida lands from any relinquishment of aboriginal title.

The first article of the treaty stated that "[t]he Oneidas do cede and grant all their lands to the people of the State of New York forever." Pet. App. 136a. The second article provided, however, that, "[o]f the said ceded lands," a specified 300,000-acre tract "shall be reserved for the following several uses. That is to say, * * * the Oneidas shall hold [the reserved lands] to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any manner alienated or disposed of to others." *Id.* at 136a-137a; see *id.* at 137a (referring to "reservation to the Oneidas" and "reservations of lands to the Oneidas for their own use"). The terms "reserved" and "reservation," with a guarantee of the lands to the Oneidas "forever," would most naturally have been understood to except the 300,000-acre parcel from the Tribe's cession of land to the State, rather than to grant the Tribe a reduced property interest in a portion of the ceded lands. See Felix S. Cohen, *Handbook of Federal Indian Law* 34 (1982 ed.) ("The term 'Indian reservation' originally had meant any land reserved from an Indian cession to the federal government regardless of the form of tenure.").

This Court has construed federal treaties employing a similar formula—*i.e.*, a general cession of tribal property, followed by a specific "reservation"—as preserving rather than extinguishing aboriginal rights in the reserved lands. See, *e.g.*, *United States* v. *Winans*, 198 U.S. 371, 381 (1905) ("Only



a limitation of [aboriginal rights] * * * was * * * intended, not a taking away."); cf. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 552-553 (1832). Consistent with that interpretive approach, United States Attorney General Bradford explained in a 1795 opinion that,

> as respects the lands thus reserved[,] the [state] treaties [with the Oneidas, Onondagas and Cayugas] do not operate further than to secure the State of New York the right of preemption: but subject to this right they are still the lands of those nations, and their claims to them, it is conceived cannot be extinguished [bu]t by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress.

Resp. Br. in Opp. App. 2a-3a. This Court in *Oneida II* similarly explained that, in the 1788 treaty, the State had "purchased the vast majority of the Oneidas' land," while "[t]he Oneidas retained a reservation of about 300,000 acres." 470 U.S. at 231.

### C. The 1794 Treaty Of Canandaigua Confirmed Federal Recognition Of And Protection For The Oneida Nation's New York Reservation

The correct disposition of this case ultimately does not depend on whether the Oneida Nation retained its aboriginal or other specially-protected rights in the 300,000-acre parcel after the Treaty of Fort Schuyler, or instead relinquished those rights and received a state-law property interest in the lands. Under either construction of the 1788 treaty with the State, the 1794 Treaty of Canandaigua between the United States and the Six Nations established the relevant tract of Oneida land as a *federally*-protected reservation. The 1794 Treaty thus immunized the lands from state and local taxation and (together with the Trade and Intercourse Acts) forbade their alienation without federal approval. Petitioner contends (Br. 23) that the "1794 Treaty of Canandaigua was nothing more than an acknowledgment by the federal government of the Oneida reservation previously created by

New York State in the 1788 Treaty of Fort Schuyler." That interpretation is contrary to the text and historical context of the Treaty, and to this Court's decision in *New York Indians I*.

1. Rather than simply recognizing that specific lands were "reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York," Article 2 of the 1794 Treaty states that the "United States acknowledges" those lands, "called their reservations, to be their property." Pet. App. 141a. Article 2 further states that the United States will "never claim" the reservations nor "disturb" those Nations "in the free use and enjoyment thereof," and that "the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Ibid.* By its terms, Article 2 thus provides a federal guarantee of the Oneida Nation's ownership, free use and enjoyment, and protection against alienation of the land, rather than simply an acknowledgment of the Nation's state-law rights. In return, the Tribes agreed that they would "never claim any other lands, within the boundaries of the United States." *Id.* at 142a-143a (Art. 4).

The historical context in which the Treaty of Canandaigua was negotiated reinforces the natural reading of its text. The 1794 Treaty was the third in a series of treaties over ten years (1784, 1789, and 1794) in which "the National Government promised that the Oneidas would be secure" in the possession of their lands. *Oneida II*, 470 U.S. at 231. The 1794 Treaty is thus naturally read in context as providing a "reaffirm[ation]" of the promise first made by the United States in 1784. *Ibid.*

2. In *New York Indians I*, this Court addressed the status of lands that Article 3 of the 1794 Treaty "acknowledge[d] * * * to be the property of the Seneca Nation." Pet. App. 142a. In invalidating the State of New York's attempt to tax Seneca lands protected by that Treaty, the Court characterized the tax as "a direct interference" by the



State "with these ancient possessions and occupations, secured by the most sacred of obligations of the Federal government." 72 U.S. (5 Wall.) at 768. The Court traced those "sacred obligations" directly to the provisions of the Treaty of Canandaigua that secured the Senecas' "free use and enjoyment" of the reservations and their property rights in them. *Ibid.*; see *id.* at 766-767; *Oneida I*, 414 U.S. at 671-672. Those provisions, the Court stressed, are "guarantees given by the United States, and which her faith is pledged to uphold." *New York Indians I*, 72 U.S. (5 Wall.) at 768. The Court further held that, under the 1794 Treaty, the Seneca Nation possessed an "indefeasible title to the reservations that may extend from generation to generation," which title "will cease only by dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption * * *, and this with the consent of the [federal] government." *Id.* at 771.[2]

No plausible basis exists for construing the Treaty of Canandaigua to deny the Oneida Nation the federal protec-

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[2] Petitioner suggests (Br. 27)—in an argument not presented to the courts below—that the treaty language pledging that the reservations "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase" (Pet. App. 141a), effectively authorized the State of New York to acquire the tribal lands without federal approval. Far from constituting an implied repeal of the Trade and Intercourse Act, however, that language simply reiterated the federal government's pledge that nothing would disturb the Indians' right to occupy their lands unless and until the Indians decided to sell them to a buyer having the "right to purchase." That category of potential buyers would be limited to those who (1) owned the "right of preemption" (which, with respect to the Oneidas, was the State of New York) and (2) had complied with the requirements of the Trade and Intercourse Act. See *New York Indians I*, 72 U.S. (5 Wall.) at 771. Petitioner's misreading of the treaty language may stem from its erroneous understanding (see Br. 28-29) that the State's "right of preemption" included the authority to extinguish Indian title. In fact, although the owner of the "right of preemption" had the exclusive right to purchase land from the Indians if and when Indian title was extinguished, the power to extinguish Indian title was vested exclusively in the United States. See *Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1150 (2d Cir. 1988); *Oneida I*, 414 U.S. at 670.

tion (including immunity from state and local taxation) of its reserved lands that the Treaty conferred upon the Senecas. The guarantees made to the Oneidas in Article 2, and those given to the Senecas in Article 3, were framed in essentially identical language. Compare Pet. App. 141a, with *id.* at 142a. Article 4 of the Treaty, moreover, expressly linked the promises made by the United States to the Oneidas, Onondagas, Cayugas, and Senecas, and it recorded equivalent concessions made by all four Tribes as a group. See *id.* at 142a-143a. This Court's holding in *New York Indians I* that the Treaty of Canandaigua barred state taxation of reserved Seneca lands therefore makes clear that the parcels at issue in this case were likewise subject to federal protection, and thus immune from state and local taxation, at the time of their sale in 1805 and 1807.[3]

## II. THE 1838 TREATY OF BUFFALO CREEK DID NOT DISESTABLISH THE ONEIDA NATION'S NEW YORK RESERVATION OR ABROGATE THE TAX IMMUNITY FOR THE NATION'S LANDS

Although reservation land is generally immune from state and local taxation, Congress may abrogate that immunity or revoke the land's reservation status. See *Cass County*, 524 U.S. at 110-111. Congress will not be found to have authorized taxation of reservation land, however, "unless it has 'made its intention to do so unmistakably clear.'" *Id.* at 110 (quoting *County of Yakima*, 502 U.S. at 258). Similarly, dis-

[3] Because the parcels at issue here were initially acquired from the Oneidas in violation of the Trade and Intercourse Acts, petitioner's reliance (Br. 30, 41) on *Cass County* is misplaced. In *Cass County*, this Court held that tracts sold and later reacquired by an Indian Tribe were subject to local taxation *because* Congress had by statute "removed that reservation land from federal protection and made it fully alienable." 524 U.S. at 113. The Court relied on prior decisions holding that, when Congress renders particular Indian lands freely alienable, its action will ordinarily be construed to eliminate any federal barrier to state and local taxation. *Id.* at 110-114. Here, by contrast, Congress never authorized—indeed it prohibited—the alienation of the relevant parcels.



establishment of a reservation requires "clear and plain" evidence of congressional intent. *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). Contrary to petitioner's contention (Br. 31-40), the 1838 Treaty of Buffalo Creek did not abrogate the tax immunity for Oneida lands or the federal reservation secured by the 1794 Treaty of Canandaigua.[4]

### A. The Text Of The Treaty Of Buffalo Creek Does Not Effect A Relinquishment Of The Oneidas' New York Lands, An Abrogation Of The Tax Immunity Of Those Lands, Or A Disestablishment Of The Oneidas' New York Reservation

1. The Treaty of Buffalo Creek, concluded on January 15, 1838, was negotiated by Commissioner Ransom H. Gillet on behalf of the United States with "the several tribes of New York Indians," including the Oneidas. See Pet. App. 147a. The 1838 Treaty was intended to redress the difficulties that the New York Indians had experienced in removing to lands previously set aside for them in Wisconsin, see Articles of Agreement, Feb. 8, 1831, U.S.-Menomonee Tribe, 7 Stat. 342; Pet. App. 10a n.8, 147a-148a, and it recognized that "many

[4] In its amicus brief in *Oneida II*, the United States articulated a possible argument that, by signing the Treaty of Buffalo Creek, the Oneidas had relinquished their claim to a New York reservation. That brief stated, however, that the United States had not "reached a concluded view on the relinquishment question," and noted that the issue "would require further examination of the circumstances surrounding the Treaty of Buffalo Creek and subsequent events, including the Indians' understanding of the transaction." Nos. 83-1065 & 83-1240 U.S. Br. at 33. Upon further consideration of the historical record, including the written assurances made to the New York Oneidas by Commissioner Gillet (see pp. 20-22, *infra*), the United States has determined that the Treaty did not effect a disestablishment of the New York reservation or a relinquishment by the Oneida Nation of its claims to New York lands.

who were in favour of emigration, preferred to remove at once to the Indian territory," *id.* at 148a.

In Article 1 of the 1838 Treaty, the New York Indians "cede[d] and relinquish[ed] to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831," with the exception of a specified tract at Green Bay on which some of the New York Indians then resided. Pet. App. 149a. In Article 2, the United States agreed, "[i]n consideration of the above cession and relinquishment," to "set apart" 1,824,000 acres of lands in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes." *Ibid.* Articles 1 and 2 of the 1838 Treaty "summarize[d] the central bargain between the New York Indians and the federal government: the cession of the New York Indians' Wisconsin lands in exchange for reservation land in Kansas." *Id.* at 33a-34a. Those Articles did not refer to any cession of land in New York, and they provide no basis for concluding that the Treaty abrogated the tax immunity for the New York lands under the Treaty of Canandaigua or disestablished the reservation secured by that Treaty.

2. In arguing that the 1838 Treaty disestablished the Oneidas' New York reservation, petitioner principally relies on Article 13 of the Treaty, which set forth the "special provisions for the Oneidas residing in the State of New York." Pet. App. 155a. Under Article 13, the United States promised to make cash payments to specified Oneida leaders for their expenses in obtaining the Wisconsin lands, and the Oneidas "agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Ibid.* By its terms, the Oneidas' obligation to remove to the Indian Territory was thus made contingent on their ability to negotiate mutually acceptable terms with the State for the sale of their New



York lands—a contingency that never occurred because the Oneidas in New York refused to relocate. Pet. App. 13a; *New York Indians II*, 170 U.S. at 8-10. Given the inherent uncertainty of such a bargaining process, and in the absence of any express reference to the Treaty of Canandaigua, Article 13 does not provide the requisite "clear and plain" evidence (*Yankton Sioux Tribe*, 522 U.S. at 343) of congressional intent to disestablish the pre-existing reservation.[5] Indeed, Article 13 squarely *refutes* any suggestion that the Treaty of Buffalo Creek effected an immediate cession of the Oneidas' New York lands, since Article 13 expressly contemplated the possibility of future transactions in which the Tribe would sell that property to the State.

3. Petitioner is also wrong in arguing (Br. 37) that allowing the Oneida Nation to retain its New York reservation would have been logically inconsistent with the 1838 Treaty's provision of Kansas lands to the Oneidas. Taken to its logical conclusion, that argument would suggest that the prior treaty with the Menomonees, under which the United States acquired Wisconsin lands "as a home to the several tribes of the New York Indians" (7 Stat. 343), implicitly divested the Oneida Nation of its New York property. The Treaty of Buffalo Creek, however, reflected a clear understanding that the Oneidas retained their New York lands even after the treaty with the Menomonees, since Article 13 of the 1838 Treaty referred to the possible future sale of those lands to the State. If the 1831 cession of Wisconsin lands to the Oneidas did not logically preclude the Nation's continued ownership of New York lands, there is no reason (absent a clear expression of such intent in the 1838 Treaty of Buffalo

[5] Petitioner does not argue that the Treaty of Buffalo Creek ratified the purchases of other lands from the Oneidas that had been made prior to 1838 without federal approval, and that Treaty does not in any event satisfy the test for ratification set forth in *Oneida II*, 470 U.S. at 246-248.

Creek) to ascribe more sweeping consequences to the subsequent exchange of Kansas lands for Wisconsin property.[6]

### B. The Negotiating History Of The Treaty Of Buffalo Creek Confirms That The Treaty Did Not Abrogate Protections For The Oneidas' New York Lands

In June 1838, the Senate amended the Treaty of Buffalo Creek and gave its consent to the Treaty as amended, subject to the condition that "the treaty shall have no force or effect whatever * * * until the same, with the amendments

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[6] Petitioner's reliance (Br. 38-39) on *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339 (1941), is misplaced. In *Santa Fe Pacific*, this Court held that, in light of the prior course of dealings between the Walapais Indians and the United States (see *id.* at 356-358), the Walapais' acceptance of a new federal reservation "must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation." *Id.* at 358. The Court based that holding, however, on the "historical setting" in which the reservation was created; it did not announce a per se rule that a Tribe's acceptance of a federal reservation invariably operates as a renunciation of tribal claims to other lands. *Ibid.*; see *id.* at 357-358.

The circumstances surrounding the negotiation and ratification of the Treaty of Buffalo Creek differed substantially from those that preceded the creation of the Walapais' reservation. First, the Treaty of Buffalo Creek specifically defined the nature of the Tribe's obligations: Article 1 provided for the cession of the Oneidas' *Wisconsin* lands, and Article 13 made clear that the Nation would retain its New York lands, unless and until those lands were sold to the State, even after the Treaty took effect. Second, when the Treaty of Buffalo Creek was ratified, the Oneidas already possessed the federal reservation secured by the Treaty of Canandaigua. The Walapais, by contrast, had no pre-existing reservation, but simply claimed aboriginal title to certain lands. See *Santa Fe Pac.*, 314 U.S. at 344-345; cf. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-282 (1955) (discussing difference in degree of legal protection for "recognized" title, which constitutes a property interest cognizable under the Fifth Amendment, and aboriginal title, which may be extinguished by Congress at will and without compensation). Third, the negotiating history of the Treaty of Buffalo Creek provides weighty contemporaneous evidence—evidence having no analogue in *Santa Fe Pacific*—that the Treaty was not intended to effect a disestablishment of the Oneidas' New York reservation or a relinquishment of their treaty-protected New York lands. See pp. 20-22, *infra*.



herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of [the signatory] tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto." *New York Indians II*, 170 U.S. at 21-22. Pursuant to that directive, Commissioner Gillet met with the Oneidas on August 9, 1838. Pet. App. 35a-36a, 173a; Resp. Br. in Opp. App. 6a-11a. At that time, Gillet provided the Oneidas and their attorney with a written "assurance" to quell "their fears that they might be compelled to remove, even without selling their land to the State." *Id.* at 7a.

That assurance stated that "the treaty was not, & is not intended to compel the Oneidas to remove from their reservations in the state of New York," and that the Oneidas could "choose to * * * remain where they are forever." Resp. Br. in Opp. App. 10a. The document memorializing the Oneidas' assent to the 1838 Treaty referred to Gillet's declaration and included Gillet's affirmation that the assent was voluntary. Pet. App. 35a n.18, 173a. Petitioner's interpretation of the 1838 Treaty as implicitly disestablishing the Oneidas' New York reservation, and extinguishing all federal protection for the Nation's New York lands, cannot be reconciled with the assurances through which the Oneidas' assent to the Treaty was obtained.

Petitioner contends (Br. 36) that the court of appeals erred in relying on the Gillet declaration because it was never made part of the Treaty itself. That argument is misguided. This Court "interpret[s] treaties to give effect to the terms as the Indians themselves would have understood them," *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), and the Gillet declaration provides powerful evidence of the Oneidas' understanding at the time they assented to the Treaty. It is also appropriate to assume that the contemporaneous explanation given by the federal commissioner accurately reflected the President's intent in making the Treaty and the Senate's intent in approving it—particularly in light of the Senate's express directive that

the treaty would take effect only after it had been "fully and fairly explained by a commissioner of the United States" and the signatory Tribes had given their "free and voluntary assent thereto." *New York Indians II*, 170 U.S. at 21-22.[7]

### C. This Court's Decision In *New York Indians II* Does Not Support Petitioner's Contention That The Treaty Of Buffalo Creek Disestablished The Oneidas' New York Reservation

In *New York Indians II*, this Court held that the New York Indians (including the Oneidas) were entitled to compensation for the government's disposal of the lands set aside for them in Kansas. 170 U.S. at 36. Contrary to petitioner's contention (*e.g.*, Br. 33), the fact that the Oneidas residing in New York (and their descendants) shared in that monetary recovery does not suggest that the 1838 Treaty divested the Nation of its New York lands or abrogated federal protections for those lands. As the Court in *New York Indians II* explained, the Tribes that entered into the Treaty of Buffalo Creek "were possessed of some sort of title or interest in a large quantity of lands in Wisconsin, which the government was desirous of acquiring, and for which it was willing to make a large cession in the [Indian Territory]." *Id.* at 14. That the Indians who possessed a "title or

[7] Although the Gillet report was not prepared until after the Senate had given its consent to the Treaty of Buffalo Creek on June 11, 1838, the report was transmitted to the Senate, and in January 1840 it was ordered to be printed together with the Treaty and other accompanying documents. See Resp. Br. in Opp. App. 5a. Subsequently, on March 25, 1840, the Senate passed a resolution stating that the Treaty of Buffalo Creek, as amended on June 11, 1838, had "been satisfactorily acceded to and approved of by [the signatory] tribes," and that the President was therefore "authorized to proclaim the treaty as in full force and operation." C.A. App. 1579; see *New York Indians II*, 170 U.S. at 23. The passage of that resolution indicates that the Senate approved of the assurances previously given to the Oneidas by Commissioner Gillet, since the earlier-stated condition precedent to the Treaty's taking effect—*i.e.*, that the Tribes must assent to the Treaty after its terms had been "fully and fairly explained"—would not have been satisfied if Commissioner Gillet's explanation of the Treaty's terms had been substantially inaccurate.



interest" in the Wisconsin lands included those who continued to reside in New York as of 1838 is clear from the Preamble to the 1838 Treaty, which stated that "various considerations have prevented those still residing in New York from removing to Green Bay, * * * [a]nd they therefore applied to the President to take their Green Bay lands." Pet. App. 148a. The New York Oneidas' cession of their interest in most of the Tribe's Wisconsin tracts in exchange for the Kansas lands provided a fully sufficient basis for their receipt of damages for the government's subsequent sale of the Kansas property.

The Court in *New York Indians II* did state that the "main inducement" for the United States to enter into the Treaty of Buffalo Creek "[p]robably" was the "agreement of the Indians to remove beyond the Mississippi." 170 U.S. at 15. But the exchange of Wisconsin lands for Kansas lands itself promoted that objective. And the fact that removal of the Indians from their eastern lands may have been the government's principal objective does not mean that the Treaty guaranteed that result as a matter of law. Cf. *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). Particularly in light of the facts that the New York Oneidas' obligation to remove was made contingent on their reaching "satisfactory arrangements" with the State for the sale of their New York lands (Pet. App. 155a), and that the Tribe's assent to the 1838 Treaty was premised on assurances that its members would not be *compelled* to remove, the Treaty does not provide "clear and plain" (*Yankton Sioux*, 522 U.S. at 343) evidence of congressional intent to disestablish the federal reservation secured by the 1794 Treaty of Canan-

daigua, or to abrogate the immunity from taxation under that Treaty for lands occupied by the Oneidas.[8]

## III. THE ONEIDA INDIAN NATION OF NEW YORK IS A SUCCESSOR-IN-INTEREST TO THE HISTORIC ONEIDA NATION AND MAY ASSERT ITS STATUTORY AND TREATY RIGHTS

The OIN is recognized by the Executive Branch as an Indian Tribe and as a political successor-in-interest to the historic Oneida Nation. See 68 Fed. Reg. 68,182 (2003); J.A. 207-208 (1976 affidavit from Interior Department official). Petitioner nevertheless contends (Br. 40) that the OIN cannot claim an exemption from state and local taxation of the parcels it recently reacquired because the Oneidas allegedly ceased to exist as a Tribe for some unspecified period during the late nineteenth and early twentieth centuries. That argument lacks merit.

[8] Essentially for the foregoing reasons, petitioner's reliance (Br. 17-19, 24-25) on *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), is misplaced. In that case the Court considered whether land owned in fee by the Native Village of Venetie "falls within the 'dependent Indian communities' prong of the [Indian country] statute, [18 U.S.C.] § 1151(b)." *Id.* at 527. In concluding that the land at issue did not fall into that "limited category," the Court noted that Congress had expressly "revoked the existing Venetie Reservation, and indeed revoked all existing reservations in Alaska * * * save one." *Id.* at 532. Because Congress has not expressly revoked the Oneida reservation secured by the Treaty of Canandaigua, the Court's decision in *Venetie* has little relevance here. See Pet. App. 24a (explaining that "reservation land" is "by its nature * * * set aside by Congress for Indian use under federal supervision," and thus qualifies as "Indian country" under *Venetie*); cf. 18 U.S.C. 1151(a) (defining the term "Indian country" to include, without qualification, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government"); *Venetie*, 522 U.S. at 528 n.3 (noting that, before the enactment of Section 1151, this Court "had also held, not surprisingly, that Indian reservations were Indian country"). Moreover, quite aside from the reservation status of the land at issue in this case, the Treaty of Canandaigua independently secures a tax immunity for lands owned by the Oneidas through its guarantee of the Oneidas' "free use and enjoyment" of such lands.



### A. This Court Recognized In *Oneida II* That The OIN Is A Successor-In-Interest To The Oneida Nation And Is Entitled To Assert The Rights Of Its Predecessor

In *Oneida II*, this Court recognized the OIN, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council to be "the direct descendants of the Oneida Indian Nation, one of the six nations of the Iroquois." 470 U.S. at 230.[9] Recognition of the OIN as the Oneida Nation's successor Tribe was logically necessary to the Court's holding (see *id.* at 233-236) that the OIN could assert a current right of occupancy to lands wrongfully acquired from the Oneida Nation in 1795. Petitioner makes no effort to reconcile its claim of tribal discontinuity with the outcome and analysis of *Oneida II*.

### B. Decisions Concerning The Recognition Of Indian Tribes Are Entrusted To The Executive Branch, Which Has Recognized The OIN To Be A Successor-In-Interest To The Oneida Nation

1. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 124 S. Ct. 1628, 1633 (2004). In particular, this Court has long held that tribal status determinations are the province of the political Branches. See *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866) ("If by [the political Branches] those Indians are recognized as a tribe, this court must do the same."); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (Although Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, * * *

[9] The other courts that have considered the question have uniformly reached the same result. See, *e.g.*, *Oneida Indian Nation* v. *United States*, 26 Ind. Cl. Comm. 138, 149 (1971), aff'd, 201 Ct. Cl. 546 (1973); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527, 532-533, 538, 540 (N.D.N.Y. 1977); *Oneida Indian Nation* v. *County of Oneida*, 719 F.2d 525, 527-528, 538-539 (2d Cir. 1983); *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d 104, 118-119 (N.D.N.Y. 2002).

in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."); see also *Miami Nation of Indians of Indiana, Inc.* v. *United States Dep't of the Interior*, 255 F.3d 342, 347-349 (7th Cir. 2001); cf. *Clark* v. *Allen*, 331 U.S. 503, 514 (1947) ("[T]he question whether [Germany was] in a position to perform its treaty obligations [after World War II] is essentially a political question."). Congress has assigned the authority to govern Indian relations, including the responsibility to resolve questions of tribal existence and recognition, to the Department of the Interior.[10]

In 1979, the Department of the Interior published an official list of those entities—including the OIN—already acknowledged to exist as "Indian tribal entities that have a government-to-government relationship with the United States." 44 Fed. Reg. 7236; see Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified in part at 25 U.S.C. 479a to 479a-1) (confirming Secretary's authority and responsibility for identifying Indian tribes). That action reflected the judgment of the Executive Branch agency charged with responsibility for Indian affairs that the Oneidas have enjoyed a sufficiently continuous existence to be (a) capable of exercising the

[10] Recognition of Indian Tribes was originally accomplished through the negotiation and ratification of formal treaties pursuant to Article II, Section 2, Clause 2 of the Constitution. See *Golden Hill Paugussett Tribe of Indians* v. *Weicker*, 39 F.3d 51, 57 (2d Cir. 1994). "When formal treaty making was abandoned [in 1871, see 25 U.S.C. 71], the federal government continued to make agreements with Indian tribes, similar to treaties, but requiring approval by both Houses of Congress, and government policy with respect to Indians was expressed through legislation and executive orders." *Ibid.* The Department of the Interior is vested by statute with the responsibility to manage Indian affairs, see, *e.g.*, 25 U.S.C. 1, 2, 9, 461 *et seq.*, which necessarily includes the responsibility to determine which Tribes should be federally recognized.



sovereignty possessed by the historic Oneida Nation before the time of European settlement, see *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); and (b) entitled to vindicate the Oneida Nation's rights under federal statutes and treaties. See J.A. 207-208 (1976 affidavit by Interior Department official describing the OIN as "one of the Indian tribes which entered into and signed" the Treaties of Fort Harmar and Canandaigua).[11] Given the preeminent role of the political Branches in matters of this character, the Department's formal recognition of the OIN as an Indian Tribe and as a successor-in-interest to the Oneida Nation provides a sufficient basis for rejecting petitioner's claim of tribal discontinuity.

2. Even if some judicial review of that agency determination were appropriate, the scope of the inquiry would be highly limited and deferential. A court could not (as the dissenting judge in the court of appeals appeared to believe, see Pet. App. 56a-60a) appropriately conduct a factual inquiry into whether the Oneidas' past activities were such that the political Branches *ought* to have withdrawn recognition of the Tribe at some earlier point in time. Rather, the only question that is even arguably appropriate for judicial resolution is whether the political Branches *actually* terminated their recognition of the Tribe.

[11] The Interior Department has promulgated regulations governing recognition of groups not already acknowledged by the United States as Tribes, and those regulations have always included the requirement of continuous tribal existence. See 43 Fed. Reg. 39,361 (1978), revised 59 Fed. Reg. 9280 (1994) (codified at 25 C.F.R. Pt. 83). Petitioner suggests (Br. 41) that the OIN's inclusion on the list of federally-recognized Tribes signifies nothing more than eligibility for federal benefits. That is incorrect. The list serves to identify those Indian Tribes that are sovereign entities in a legal and political sense, *i.e.*, "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), capable of exercising certain attributes of their original sovereignty. See 25 U.S.C. 479a(2); H.R. Rep. No. 781, 103d Cong., 2d Sess. 2 (1994) (federal "recognition" confirms that the Tribe is a "domestic dependent nation" capable of a "government-to-government relationship" with the United States); 25 C.F.R. 83.2.

The relevant course of events refutes the suggestion that such official withdrawal of recognition ever occurred, and demonstrates that the United States continued to deal with the Oneidas as a Tribe during the late nineteenth and early twentieth centuries. During that period, for example, the United States continued to honor its obligation under Article 6 of the 1794 Treaty of Canandaigua (Pet. App. 143a) to pay annuities and deliver "treaty cloth" to the Oneida Nation. See *United States* v. *Boylan*, 256 F. 468, 487 (N.D.N.Y. 1919) ("[T]he United States government, under a treaty with the Oneida Indians, is paying to the remnants of that tribe each year several thousand dollars worth of goods."), aff'd, 265 F. 165 (2d Cir. 1920); *id.* at 489-490 (explaining that the payment obligation arose under the Treaty of Canandaigua).

The *Boylan* litigation arose out of an ejectment action, brought by the United States in its trust capacity on behalf of the Oneidas, against private parties who had claimed title to a 32-acre tract of land within the boundaries of the reservation secured by the Treaty of Canandaigua. The district court observed that "[t]he United States has steadily and uniformly asserted its jurisdiction over the Indians of the 'Six Nations,' which * * * included the Oneida Indians and other New York tribes." *Boylan*, 256 F. at 479. The court held that lawful possession of the disputed lands should be restored to the Oneidas, explaining that, as of 1906,

> the Oneida Reservation still existed, although reduced in area, and what remained was peopled by Indians, quite a number of whom made their home on the premises in question; most of them coming and going, it is true, but this was their home. The title had descended to them from those who occupied the lands when Columbus discovered America, and had never gone out of them.

*Id.* at 481.

The court of appeals affirmed, agreeing with the district court that "the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward



each other the relation of guardian and ward." *United States* v. *Boylan*, 265 F. 165, 174 (2d Cir. 1920); see *id.* at 171 (holding that the United States was authorized to file the ejectment action on the Oneidas' behalf because the Oneidas "exist as a separate band or tribe, and therefore as a separate nation"). Both the position taken by the United States in *Boylan*, and the disposition of the case by the district court and court of appeals, refute petitioner's contention that federal recognition of the Oneidas as a Tribe was withdrawn during the late nineteenth or early twentieth century.[12]

In disputing the continuity of the Oneidas' tribal existence, petitioner principally relies (Br. 43-45) on selected statements from five individual reports filed by officials of the Department of the Interior between 1891 and 1906, during the assimilation period. None of these statements, however, can plausibly be characterized as a formal determination by the United States that the Oneidas' legal and political status as a Tribe had been extinguished or abandoned.[13] Even the selected reports on which petitioner relies

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[12] Unlike the lands involved in *Boylan*, the parcels involved in the instant case have been occupied by Oneida Indians for only a small portion of this country's history. Petitioner's principal legal arguments suggest, however, that local governments may now tax even those lands (like the *Boylan* tract) that have remained continuously or virtually continuously in the Oneidas' possession. That result would appear to follow logically from acceptance of petitioner's contention that (1) the 300,000-acre parcel reserved in the Treaty of Fort Schuyler was never placed under federal protection; (2) any federal reservation that the Oneidas previously possessed was disestablished by the Treaty of Buffalo Creek; or (3) the Tribe ceased to exist, and Oneida lands thereby lost their "Indian country" status, at some point in the late nineteenth or earlier twentieth century.

[13] The Commissioner of Indian Affairs' assertion (C.A. App. 1229) that the Oneidas in 1891 had no "tribal relations" might indicate that there were "[f]luctuations in tribal activity during various years." See 25 C.F.R. 83.6(e). But such fluctuations are not uncommon in this Nation's history, and they are insufficient to demonstrate that a Tribe's existence or its relationship with the United States has legally been extinguished. See, *e.g.*, *ibid.* (Interior Department regulation explains that a Tribe seeking initial recognition must demonstrate "political influence or authority * * * on a substantially continuous basis, but this demonstration does not

contain references to the Oneidas' continued tribal existence.[14] The vast majority of annual reports filed by the Commissioner of Indian Affairs from 1880 to 1915 provide official tribal population statistics for the Oneidas, and most make reference to either the Oneida "reservation" or "reserve" in New York.[15] Petitioner's evidence therefore provides no basis for rejecting the Executive Branch's determination that the Oneidas have existed continuously as a Tribe through this country's history, and that the OIN is entitled to assert the rights of its predecessor the Oneida Nation.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.



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require meeting these criteria at every point in time"); *United States* v. *John*, 437 U.S. 634, 652-653 (1978); *Bryan* v. *Itasca County*, 426 U.S. 373, 389 (1976); *United States* v. *Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981) (noting that "[f]ederal policy has sometimes favored tribal autonomy and sometimes sought to destroy it," and that "[a] degree of assimilation is inevitable under these circumstances and does not entail the abandonment of distinct Indian communities").

[14] The 1891 report (at 312) lists the Oneidas as one of the six Tribes under the authority of the New York Indian agency. The 1893 report (at 700, 714) states that 182 Oneida Indians reside on the "Oneida Reserve," and it refers to that "Reserve" in two separate tribal statistical tables. The 1900 (at 610, 646) and 1901 (at 696, 716) reports state that 160 and 144 Oneida Indians, respectively, reside on the "Oneida Reserve," which is described as containing 365 acres. The 1906 report, in addition to providing a tribal census (at 286, 482), specifically refers (at 461) to an Oneida reservation of 350 acres as guaranteed by the Treaty of Canandaigua. By letter dated September 27, 2004, respondents have requested permission to lodge those (and other) Commissioner's reports with this Court.

[15] With only one exception, every annual report from 1880 to 1915 provides a census for the Oneidas living in New York. Most of those reports also provide acreage statistics for the Oneida "reserve" (consistently recorded as containing 350 acres after 1906) and describe the distribution of annuities to the Oneidas and the other Six Nations.

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No. 03-855

In The

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner,*

*-against-*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT GREEN, BRIAN PATTERSON, AND IVA ROGERS,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## CORRECTED BRIEF OF *AMICI CURIAE* CAYUGA AND SENECA COUNTIES, NEW YORK AND THE DEFENDANT CLASS OF LANDOWNERS IN *CAYUGA INDIAN NATION V. PATAKI* IN SUPPORT OF PETITIONER CITY OF SHERRILL SEEKING REVERSAL

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## INTEREST OF THE *AMICI CURIAE*

The *amici* are the Counties of Cayuga and Seneca, New York ("Counties"), and a class of private landowners ("Cayuga landowners"), who are defendants in a New York Indian land claim, brought in the U.S. District Court for the Northern District of New York, by two alleged successors of the historic Cayuga tribe and the United States, and captioned *Cayuga Indian Nation of New York v. Pataki*. The case was filed in 1980.[1]

The *Cayuga* plaintiffs claim that the State of New York's purchases of land from the historic Cayugas in 1795 and 1807 were invalid, because they occurred without the federal approval required by the Indian Trade and Intercourse Act, 25 U.S.C. § 177 (the "ITIA").[2] Their

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[1] The defendant class of landowners was certified in *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627 (N.D.N.Y. 1981). The other defendant in the *Cayuga* case is the State of New York, which is also filing an *amicus* brief in this matter. As described below, *Cayuga* currently is pending before the U.S. Court of Appeals for the Second Circuit under docket no. 02-6111(L).

Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici*, its counsel, or insurers for the defendant class of landowners, made a monetary contribution to the preparation or submission of this brief.

The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.3.

[2] The tribal plaintiffs in *Cayuga* are the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma. Like the Oneida Indian Nation of New York ("OIN") in the instant case, each tribal plaintiff claims to be a successor to an historic Indian tribe that entered into the Treaty of Canandaigua with the United States. 7 Stat. 44.

claim has resulted in one of the largest judgments in history against the State: $248 million in damages and prejudgment interest. It has also, for more than twenty years, cast a shadow over the titles to the homes and businesses of the Cayuga landowners — thousands of residents of Central New York — who are threatened by plaintiffs' demand for ejectment. The Second Circuit now has the case *sub judice:* The State has appealed the district court's damages award, the State and *amici* herein have appealed the liability determinations against them, and the tribal plaintiffs have, among other things, cross-appealed the district court's order denying ejectment as a remedy.[3] On August 6, 2004, the Second Circuit issued an Order

[3] In the twenty-four years since the original *Cayuga* complaint was filed, the trial court issued 17 written opinions: *Cayuga Indian Nation v. Cuomo*, 565 F. Supp. 129 (N.D.N.Y. 1983) (Cayuga I); *Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938 (N.D.N.Y. 1987) (Cayuga II); *Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (Cayuga III); *Cayuga Indian Nation v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991) (Cayuga IV); *Cayuga Indian Nation v. Cuomo*, 762 F. Supp. 30 (N.D.N.Y. 1991) (Cayuga V); *Cayuga Indian Nation v. Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1991) (Cayuga VI); *Cayuga Indian Nation v. Pataki* (unpublished opinion) (July 10, 1996) (Cayuga VII); *Cayuga Indian Nation v. Pataki*, 1999 U.S. Dist. LEXIS 5228 (N.D.N.Y. 1999) (Cayuga VIII); *Cayuga Indian Nation v. Pataki*, 1999 U.S. Dist. LEXIS 6264 (N.D.N.Y. 1999) (Cayuga IX); *Cayuga Indian Nation v. Cuomo*, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999) (Cayuga X); *Cayuga Indian Nation v. Pataki*, 79 F. Supp. 2d 66 (N.D.N.Y. 1999) (Cayuga XI); *Cayuga Indian Nation v. Pataki*, 79 F. Supp. 2d 78 (N.D.N.Y 1999) (Cayuga XII); *Cayuga Indian Nation v. Pataki*, 83 F. Supp. 2d 318 (N.D.N.Y. 2000) (Cayuga XIII); *Cayuga Indian Nation v. Pataki* (unpublished opinion) (April 18, 2000) (Cayuga XIV); *Cayuga Indian Nation v. Pataki*, 2000 U.S. Dist. LEXIS 7045 (N.D.N.Y. 2000) (Cayuga XV); *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001) (Cayuga XVI); *Cayuga Indian Nation v. Pataki*, 188 F. Supp. 2d 223 (N.D.N.Y. 2002) (Cayuga XVII).



requiring the parties to submit supplemental briefs after this Court renders a decision in this case to address its applicability to the issues presented in *Cayuga*.

Among the issues on appeal in *Cayuga* is the district court's grant of summary judgment on the issue of the tribal plaintiffs' "tribal status" under the ITIA, including whether the tribal plaintiffs are successors to the historic Cayuga tribe that sold land to the State in 1795 and 1807.[4] The *Cayuga* district court held that the tribal plaintiffs satisfied this element of their claim — as a matter of law, on summary judgment — merely because they were "federally recognized." *See Cayuga II*, 667 F. Supp. at 941-43. Over the State's and *amici's* objection, the *Cayuga* district court did not consider evidence that raised a genuine issue of material fact regarding the Cayugas' tribal status. This, we contend, was error.

The tribal status issue also arises in this case: the City of Sherrill ("City") asserts that summary judgment in favor of the OIN on the issue of whether its present-day purchase of lands within an historic reservation transformed the land into "Indian country," was inappropriate, given substantial evidence that the modern tribe was not a successor to the historic tribe. The Second Circuit held that because the OIN was "federally recognized," its "repossession" of historic reservation land made that land "Indian country." *See Oneida Indian Nation of New York v. City of Sherrill, New York*, 337 F.3d 139, 165 (2d Cir. 2003) ("*Sherrill*") ("We find, however,

[4] Other issues on appeal in *Cayuga* include the availability and application of various defenses to an ITIA claim, including abandonment, ratification, election of remedies, laches, and geographic non-applicability of the ITIA.

no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land."). The *Sherrill* court, like the *Cayuga* court, did not look past the fact of federal recognition.

Tribal status is a critical question in cases in which modern tribes assert claims based on historic property interests held by their alleged predecessors.[5] Indian title belongs to the tribe, not to individual members of the tribe, and therefore only the historic tribal entity or its successors may reach back across the centuries and threaten the long-settled titles of thousands of innocent landowners. *See, e.g., United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) (requiring proof that tribal plaintiff was same entity that signed subject treaty).

As argued herein, contrary to the rulings in *Cayuga* and *Sherrill*, federal recognition does not resolve the question of whether a modern tribe is the same entity as the historic entity and entitled to assert historic property rights. It was not until 1978 that the Bureau of Indian Affairs ("BIA") first promulgated regulations governing federal recognition. The OIN and the Cayugas were recognized prior to these regulations, at a time when tribal status was an *ad hoc* determination. Thus, unlike most other federally recognized tribes, neither tribe has been subject to a searching inquiry into their status as alleged successors to

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[5] *Amici* recognize that in *Sherrill*, the issue of tribal status was not raised as a defense to an ITIA claim. However, because the OIN claims that the subject land is "Indian country" because centuries-old property transfers do not comply with the ITIA, the tribal status test should be the same in both contexts.



historic tribes. *See Golden Hill Paugussett v. Weicker*, 39 F.3d 51, 59-60 (2d Cir. 1994).

The misplaced reliance on federal recognition is of particular significance in *Cayuga* because defendants raised genuine issues of material fact on the issue of continuous existence; evidence that the district court refused to consider given the tribal plaintiffs' federal recognition. *See, e.g., Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938, 943 (N.D.N.Y. 1987). For example, Frank Bonamie, who purported to be a Chief of the modern Cayuga Indian Nation ("Nation"), admitted in his deposition that the Nation only began efforts to organize as a "tribe" in 1971, prior to which the Cayugas did not even have titular or nominal leadership. This testimony, along with other evidence submitted to the court, was more than sufficient to establish a genuine issue of material fact on the question of whether the Nation is a successor tribe and whether it existed continuously as a tribe since the 1795 and 1807 Treaties—and, therefore whether the Nation is the same tribe that treated with New York. Thus, this Court's determination of the proper scope of the tribal status inquiry reaches beyond the *Sherrill* matter, and will directly affect the Counties and the thousands of landowners in *Cayuga*.

Finally, as in *Sherrill*, the tribal plaintiffs in *Cayuga* have made open-market purchases of land within the boundaries of their alleged historic reservation, which is also within the Counties. Like the OIN, the Cayugas assert that those parcels are Indian country and, therefore, sovereign Indian land which is not subject to local taxation or regulation. This issue is currently the subject of litigation pending in the U.S. District Court for the

Northern District of New York. *See Cayuga Indian Nation v. Village of Union Springs, et al.*, Civ. A. No. 5:03-CV-01270, filed Oct. 20, 2003; *see also Seneca-Cayuga Tribe v. Town of Aurelius, et al.*, 5:03-CV-00690, filed June 3, 2003.



## SUMMARY OF ARGUMENT

Tribal status is a critical condition precedent to a modern tribe's right to make claims based upon centuries-old land transactions. There are two parts to a tribal status inquiry. The first asks whether a group of Indians presently constitutes a "tribe" which is eligible for federal benefits; that is, whether the tribe is recognized as such by the BIA. The second asks whether that tribe is the same entity as the historic tribe, or a valid successor entity, and therefore eligible to assert historic claims.[6] *See United States v. Candelaria*, 271 U.S. 432, 441 (1926) (defining a "tribe" as (1) a body of Indians of the same or a similar race, (2) united in a community, (3) under one leadership or government, and (4) inhabiting a particular, though sometimes ill-defined, territory); *Washington*, 641 F.2d 1368 (requiring tribe asserting treaty rights to prove that it is the same entity named in the treaty). The *Sherrill* court ended its analysis with the first question, and refused to consider whether the OIN is a successor to the historic Oneida Nation. This was legal error because, while a modern tribe may constitute a "tribe" that is eligible for certain governmentally-provided benefits, the tribe may only assert historic property claims if it is the same entity as the historic tribe.

Proof that a tribe is a successor to its historic namesake must be a precondition to the assertion of ancient rights in land. However, the *Sherrill* court found "no requirement in the law that a federally recognized tribe

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[6] A tribe can only be a successor to the historic entity if it has maintained a continuous tribal existence from the time of the historic tribe.

demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F.3d at 165. The *Sherrill* court's reliance on federal recognition is misplaced. While the BIA's post-1978 recognition of tribes may offer guidance to courts seeking to determine tribal status for purposes of land claims, any pre-1978 recognition is singularly unhelpful, because such determination was made before the BIA promulgated regulations that require, among other things, proof that the modern tribe is the same as the historic one. *See* 25 C.F.R. § 83.7. The OIN here, as well as the tribal plaintiffs in *Cayuga*, were recognized by the BIA at a time when tribal status was merely an *ad hoc* determination, and gave courts no indication of whether the modern tribe should be entitled to assert the ancient tribe's rights. *See Golden Hill*, 39 F.3d at 59-60 ("Before the promulgation of the [1978] acknowledgment regulations there did not exist a uniform, systematic procedure to determine tribal status within the Department of the Interior."). For tribes that were federally recognized before 1978, the question of whether a group of Indians is a "tribe" for BIA purposes is analytically distinct from, and not responsive to, the question of whether that "tribe" is a successor to the historic tribe and entitled to vindicate its rights. *Id.* ("[D]eferral [to the BIA's determination] of the issue of the tribal status was not required *nor would it aid a court in its determination.*") (emphasis added).

The *Sherrill* court minimizes petitioner's argument by framing it as unreasonable: "Any lapse in tribal identity, Sherrill concludes, rendered the OIN's land freely alienable and precludes the tribe from asserting rights in historic reservation land." *Sherrill* at 165 (emphasis added). Certainly a one-year lapse in tribal identity, or



even a five- or ten-year lapse, might not break the connection between the historic tribe's treaty rights and the modern group claiming those rights. But, at some point, a longer lapse in tribal identity should be considered by a court in determining whether the modern tribe may assert rights in land. After all, such a lapse is evidence that the modern tribe is not the same entity as the historic one. Furthermore, when descendants of historic tribes congregate and form a new, modern tribal community after a significant lapse, that "tribe" does not assume the communal property rights of the historic tribe, because individual descendents cannot possess those rights. *See, e.g., Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 913 (Ct. Cl. 1963) ("Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendents who are no longer members of the group.") (listing cases).

The OIN, like the tribal plaintiffs in *Cayuga*, has not had a continuous tribal existence--each has had substantial periods where it simply did not exist as a tribal community. For this reason, and the reasons set forth below, this Court should reverse the judgment of the Second Circuit and, if appropriate, remand this case to the district court for a factual determination of whether the OIN may prove its "tribal status," including whether it has been in continuous existence.

## ARGUMENT

The question of tribal status has two analytically distinct components. The first is whether a particular group of Indians presently constitutes a "tribe," and is eligible to receive federal benefits. The second is whether that tribe is the same entity as the historic tribe, and is eligible to assert historic claims. *See generally Washington, supra,* (distinguishing between present tribal status and historic tribal status). Even assuming the OIN presently constitutes a tribe, it was error for the *Sherrill* court to uphold the OIN's assertion of historic reservation rights absent evidence that the OIN is the same tribal entity as the historic entity.

### I. IN ORDER FOR A MODERN TRIBE TO ASSERT HISTORIC PROPERTY RIGHTS, A COURT MUST REQUIRE PROOF THAT THE MODERN TRIBE IS THE SAME ENTITY AS THE HISTORIC TRIBE.

In order to assert a historic tribe's rights in land, a modern tribe must prove that it is the same entity as the historic tribe. *See Washington*, 641 F.2d at 1371. In *Washington*, the plaintiff tribe sought fishing rights reserved in a treaty between the alleged predecessor of the tribe and the United States. *Id.* at 1370. The Ninth Circuit held that the plaintiff tribe had to prove that it was the same tribe as the one named in the treaty, even where it was undisputed that the individual members were descendents of the historic tribe. 641 F.2d 1368, 1370-73 (9th Cir. 1981).



Likewise, the court in *United States v. 43.47 Acres of Land* held that, absent proof that the plaintiff tribe was the same entity as the historic tribe that allegedly held an interest in land, it did not have standing to oppose a condemnation proceeding as violative of the ITIA. *See* 855 F. Supp. 549, 551 (D. Conn. 1994). The court concluded:

> Those here claiming to be entitled to cloak themselves with the mantle of the Schaghticoke Tribe are put to the test of establishing entitlement. The question is not whether that Tribe is an Indian tribe for purposes of the Act. The question is whether those who have here invoked its name are, or are qualified to represent, the Schaghticoke Tribe.

*Id.* at 552. The question that the *Sherrill* court refused to take up is whether the OIN is, or is qualified to represent, the historic Oneida Nation.

The decisions in *Washington* and *43.47 Acres of Land* are consistent with the communal nature of Indian treaty and property rights. Indian title is a possessory right, *see United States v. Cook*, 86 U.S. 591, 592 (1873), held in common by the tribe. *See United States v. Dann*, 873 F.2d 1189, 1195 (9th Cir. 1987); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1236 (4th Cir. 1974). Individual members of the tribe do not hold title and have no enforceable rights in tribal property.[7] *See Crowe*, 506 F.2d at 1234 (noting "established principle that

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[7] Indeed, individual Indians do not have standing to bring claims under the ITIA. *See Golden Hill*, 39 F.3d at 56; *Dann*, 873 F.2d at 1195; *Epps v. Andrus*, 611 F.2d 915, 918 (1st Cir. 1979).

lands belong to Indian tribe as a community and not to members severally or as tenants in common") (citing *Sizemore v. Brady*, 235 U.S. 441, 446 (1914)); *Holt v. Comm'r of Internal Revenue*, 364 F.2d 38, 41 (8th Cir. 1966) ("No individual Indian has title or an enforceable right in tribal property.") (listing cases); *Minnesota Chippewa Tribe*, 315 F.2d at 913 ("Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendants who are no longer members of the tribe."). If all or nearly all members of the tribe abandon the tribe, the tribal entity disappears. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (listing cases). Because the land is held by the entity, and the individual members have no interest to take upon its dissolution, if the tribe ceases to exist as a tribe, the tribe's possessory interest disappears and the fee holder takes the right by operation of law.[8]

[8] This result is consistent with other well-established principles of Indian land tenure. For example, this Court has held that when a tribe abandons its possessory right, the fee holder takes that right by operation of law. *See, e.g., Cook*, 86 U.S. at 593 (when Indian title is abandoned, possession attaches itself to the fee "without further grant"). The Court has also noted that a tribe's interest "came to an end" when right of continued use was abandoned. *See Williams v. City of Chicago*, 242 U.S. 434 (1917).



## II. THE TRIBAL STATUS ANALYSIS IN *SHERRILL* WAS ERROR BECAUSE THE COURT DID NOT REQUIRE PROOF THAT THE MODERN OIN IS THE SAME ENTITY AS THE HISTORIC ONEIDA NATION.

The Second Circuit in *Sherrill* held that the tribal status question turns on whether a group of Indians is recognized by the BIA under 25 C.F.R. § 83.7 for purposes of eligibility for federal Indian benefits. *Sherrill*, 337 F.3d at 166-67. The court summarily held that "it is undisputed that the OIN is federally recognized and the Bureau of Indian Affairs exercises jurisdiction over it." *Id.* The court's restricted inquiry into tribal status was error because tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status for purposes of asserting historic property claims. *See Golden Hill Paugussett Tribe*, 39 F.3d at 57 (distinguishing tribal status for federal benefits and for an ITIA claim).

### A. "Federal recognition" is entitled to no weight because the OIN was recognized prior to the promulgation of regulations governing tribal status.

In 1978, the Department of the Interior first promulgated regulations setting forth the criteria and procedures for determining tribal status for purposes of eligibility for federal benefits. *See* 43 Fed. Reg. 3961 (Sept. 5, 1978). These regulations expressly exempted from the new standards those groups "currently acknowledged as Indian tribes" at that time by the

Department of the Interior; the OIN, as well as the tribal plaintiffs in *Cayuga*, were among those exempted. 25 C.F.R. § 88.3; *see also* 59 Fed. Reg. 9280 (1994) (describing the history of BIA recognition procedures). As a result, the BIA has never subjected the OIN to an analysis of its status as a successor to the historic Oneida tribe, and judicial deference to the BIA's determination is inappropriate. *See Golden Hill*, 39 F.3d at 59-60 ("Before the promulgation of the [1978] acknowledgment regulations there did not exist a uniform, systematic procedure to determine tribal status within the Department of the Interior. Therefore, deferral of the issue of the tribal status was not required *nor would it aid a court in its determination*.") (emphasis added).[9]

Indeed, in *Sherrill*, Judge Van Graafeiland makes this very point in his dissent. He suggested that the court's reliance on BIA recognition was misplaced because, among other reasons, recognition was granted to the OIN prior to the creation of the BIA regulations:

> In describing the BIA tribal recognition process prior to the passage of these regulations, the First Circuit has stated that the BIA 'has not historically spent much

[9] Respondents may attempt to distinguish *Golden Hill* because it involved a tribe that was not already federally recognized. Because the issue in that case was whether the litigation should be stayed pending a BIA determination regarding the Golden Hill Paugussetts' federal recognition, however, the Second Circuit squarely addressed the question of what implications such recognition, *if obtained*, would have on the tribe's standing under the ITIA. The court analyzed when, and whether, BIA recognition of a tribe informs the tribal status inquiry—precisely the same question at issue here. Thus, any such contention by the OIN is meritless.



> effort in deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the [BIA] has dealt.' It seems unlikely that the Oneida Indian Nation of New York, volunteered to the BIA any evidence that would have weakened its tribal recognition claim, especially when one considers that they apparently were unresponsive to Sherrill's discovery requests on this issue during litigation. *Our court ought not accept reflexively BIA recognition as dispositive of continuous tribal existence when that recognition was granted before the Bureau had adopted its comprehensive criteria and when the record contains such compelling evidence of tribal dissolution.*

*Sherrill*, 337 F.3d at 173-74 (citations omitted) (emphasis added).

In contrast to the *ad hoc* determination made with respect to those tribes recognized prior to 1978, several of the "mandatory criteria for federal acknowledgment" found in the BIA's regulations require proof that that petitioning group is the same entity as the historic entity. For example, a petitioning group must demonstrate that:

> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from *historical times until the present.*

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> (c) The petitioner has maintained political influence or authority over its members as an autonomous entity *from historical times until the present.*

*Id.* at § 83.7(b), (c) (emphasis added). Thus, for those tribes, like the OIN, whose "recognition" predates the BIA regulations, the question of whether an aggregation of Indians is a "tribe" for purposes of federal benefits is analytically distinct from the question of whether that "tribe" is a successor to the historic tribe. Because the OIN has not been subject to an examination of its tribal status, this Court should reverse the decisions of the lower courts and, if appropriate, remand the case for further proceedings to determine the OIN's tribal status.

### B. It is the role of the court to determine tribal status.

*Golden Hill* also instructs that even if the BIA acknowledges a tribe for purposes of federal benefits, the court should make the ultimate judicial determination of tribal status. *Id.* at 58.[10] The court should apply the test enunciated in *Candelaria*, 271 U.S. at 441, "without regard to whether or not the particular group of Indians at issue ha[s] been recognized by the Department of the Interior." *Golden Hill* at 59.

In *Golden Hill*, a group of Indians sued under the ITIA to regain possession of alleged aboriginal land in

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[10] For this reason, the *Sherrill* court cannot be understood to have considered tribal status to be a political question (*see Sherrill*, 337 F.3d at 166), because that would have resulted in the overruling of *Golden Hill sub silentio*, a result not favored by the courts.



Connecticut. When they filed suit, the plaintiffs were not a federally recognized tribe, though they had presented a petition to the BIA seeking recognition. The district court dismissed the action, holding that the plaintiffs were required to exhaust the BIA's administrative procedures before seeking a judicial determination of tribal status under the ITIA. *See Golden Hill*, 839 F. Supp. at 135.

The Second Circuit affirmed, but did so on a different ground. Rather than relying on exhaustion principles, it instead invoked the doctrine of primary jurisdiction to provide the BIA an opportunity to consider the plaintiffs' pending petition for federal recognition. *Golden Hill*, 39 F.3d at 59-61. Importantly, the court concluded that the *Candaleria* test, discussed *infra*, and not the mere fact of federal recognition, governed tribal status, because it was developed "*after* Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs *and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior.*" *Id.* at 60 (emphasis added) (citations omitted).

In rejecting federal recognition as the exclusive test for tribal status, the *Golden Hill* court acknowledged that BIA resolution of "factual issues regarding tribal status will be of considerable assistance to the district court in ultimately deciding [plaintiffs' claims]." *Id.* at 60. Nevertheless, judicial deference to BIA recognition of tribal status attaches only to *factual findings* made in reaching that conclusion. It does not require a federal court to recognize a plaintiff as a "tribe of Indians" as a matter of law. *See id.* ("A federal court, of course, retains final

authority to rule on a federal statute, but should avail itself of the agency's aid in gathering facts and marshalling them into a meaningful pattern."). In other words, any weight accorded to BIA recognition of tribal status stems not from the recognition itself, but from the factual findings that underlie the recognition. Accordingly, while the "two standards overlap, . . . their application might not always yield identical results." *Golden Hill*, 39 F.3d at 59.[11]

*Golden Hill* demonstrates that the *Candaleria* test, not mere federal recognition, governs whether the OIN (and, likewise, the tribal plaintiffs in the *Cayuga* litigation) qualify as a "tribe of Indians" under the ITIA. Consequently, the Second Circuit's limited analysis of this issue, which did not recite or apply the *Candaleria* factors, was flawed.

In *Candelaria*, this Court set forth the controlling standard for tribal status. It defined a "tribe" as (1) a body of Indians of the same or a similar race, (2) united in a community, (3) under one leadership or government, (4) and inhabiting a particular, though sometimes ill-defined, territory. *Candelaria*, 271 U.S. at 441 (*citing Montoya v. United States*, 180 U.S. 261, 266 (1901)). *See also Golden*

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[11] The Second Circuit's reliance in *Sherrill* on *United States v. John*, 437 U.S. 634 (1978) for the proposition that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land," *Sherrill*, 337 F.3d at 165, is misplaced. There, the Court merely noted that, after the removal of the Choctaw tribe from Mississippi, there "remained persons in Mississippi who were properly regarded . . . as Indians." *Id.* at 644. The Court never addressed the question raised here: *i.e.*, whether the remnant Indians constituted a valid successor tribal entity such that they could assert a claim based on historic property rights. Consequently, *John* is inapposite.



*Hill*, 39 F.3d at 59. A review of the limited record evidence pertaining to tribal status suggests that the OIN would fail to meet the requirements of the *Candelaria* standard.

For example, there is considerable record evidence establishing a lack of Oneida leadership or governance. *Candelaria*, 271 U.S. at 442. This element of the *Candelaria* standard requires a showing that individuals or groups within the alleged tribe exercise influence over "significant elements in the lives of the people," that "people order their lives in response to these leaders' requirements in some significant way," and that such leadership is "passed on in some orderly way." *Mashpee*, 592 F.2d at 583-85. Record evidence shows, however, that the Oneida lacked the requisite tribal governance for much of the 19th century. In *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877), the Northern District of New York observed that the Oneidas no longer had active tribal governance. "Since [the 1830s], [the Oneida] tribal government has ceased as to those who remained in [New York] state. It is true those remaining here have continued to designate one of their number as chief, but his sole authority consists in representing them in the receipt of an annuity which he distributes amongst the survivors." A chief that merely distributes annuity funds does not satisfy the requirement that leadership exert influence over significant elements of people's lives.

Not only had Oneida leadership diminished to the point of irrelevancy by 1877, but by 1891 it had disappeared altogether. Record evidence shows that by 1891 the Oneidas ceased to designate tribal chiefs at all. The 1891 Annual Report of the Commissioner of Indian

Affairs to the Secretary of the Interior, at 314, stated that "the Oneida have no tribal relations, and are without chiefs or other officers."

The record also suggests that the Indian "community" requirement of the *Candelaria* test cannot be satisfied by the Oneida. *Candelaria*, 271 U.S. at 442. The First Circuit elaborated on the community requirement, stating that "an Indian community is something different from a community of Indians . . . it has some boundary that separates it from the surrounding society, which is perceived as Indian and not merely as neighborhood or territory." *Mashpee*, 592 F.2d at 586. In *Elm*, the Northern District of New York discussed the Oneidas' lack of community. The court stated in 1877 that the Oneidas "do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skin, they are identified with the rest of the population." 25 F. Cas. at 1008. Secondary sources chronicling the history of the Oneidas similarly note the lack of community within the tribe and the "hopeless division among [them]." *See, e.g.*, Laurence M. Hauptman, *Conspiracy of Interests (Iroquois Dispossession and the Rise of New York State)*, (1999).

Several administrative and secondary sources note that the tribe had ceased to exist in New York by the early 20th century. For example, in 1916 the Office of the U.S. Attorney for the Northern District of New York wrote a letter asking the Department of Interior for its view on the status of the Oneida reservation in New York. The Department of Interior Assistant Commissioner of Indian Affairs responded by writing that "as a tribe these Indians



are known no more in that state." Nine years later, in 1925, a letter from an Assistant Commissioner of Indian Affairs to Mrs. Henrietta White, referring to the Oneidas, repeated that "as a tribe these Indians are no longer known in the State of New York." In 1942, Felix Cohen's Handbook of Federal Indian Law discussed the Oneidas and noted that "as a tribe these Indians are known no more in [New York]." *Id.* at 416-17 (1942 ed.).

Finally, even this Court has remarked that by 1876 the Oneidas had lost the indicia of a "tribe" and, as a result, it was "clear" that a certain provision of the ITIA "could have no application" to the group. *See United States v. Joseph*, 94 U.S. 614, 616-18 (1876) (affirming finding that the Indians of the village or pueblo of Taos, New Mexico did not constitute a tribe for purposes of an ITIA claim, and noting that the Oneidas were similarly situated).

Because the district court and Second Circuit failed to analyze whether the OIN is a tribe under the four-part *Candelaria* test or whether they have been a "tribe" since the time of the alleged illegal transactions in the 18th and 19th centuries, if this Court determines that the subject parcels are within an existing Oneida Indian Reservation, the case should be remanded for a hearing on the continuous tribal existence of OIN to allow for the development of a full factual record.[12]

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[12] Given the Oneidas' lack of continuous tribal existence, the OIN would similarly fail to satisfy the BIA's present regulations governing federal recognition of Indian tribes.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the U.S. Court of Appeals for the Second Circuit and, if appropriate, remand this case for a determination of the OIN's tribal status.

Respectfully submitted,

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(20)

No. 03-855

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In The
# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner,*

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF AMICI CURIAE CAYUGA NATION OF NEW YORK, MOHAWK COUNCIL OF AKWESASNE, MOHAWK NATION, ONEIDA TRIBE OF INDIANS OF WISCONSIN, ONEIDA OF THE THAMES, ONONDAGA NATION, ST. REGIS MOHAWK TRIBE, SENECA NATION OF INDIANS, AND TONAWANDA BAND OF SENECA INDIANS, IN SUPPORT OF RESPONDENTS ONEIDA INDIAN NATION OF NEW YORK, ET AL.

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## INTEREST OF AMICI[1]

Amici are federally recognized and/or traditional Indian nations or tribes that are indigenous to/or historically connected to New York State.[2] Amici Oneida Tribe of Indians of Wisconsin and the Oneida of the Thames are plaintiffs in the Oneida land claim along with the Oneida Nation of New York, respondent here. *See Oneida Indian Nation of New York v. County of Oneida,* 434 F. Supp. 527, 532 (N.D.N.Y.), *aff'd*, 270 U.S. 226, 230 (*Oneida II*) (1985). All amici's experiences with New York respecting tribal lands parallels that of the Oneida: persistent trading in their lands without the required approbation of the United States, giving rise to claims against New York similar to that asserted by the Oneida. *See Report of Special Committee Appointed by the Assembly of 1888 to Investigate the "Indian Problem" of the State,* State of New York, No. 51, Albany 1889 [Whipple Report].[3]

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[1] In accordance with this Court's Rule 37.6, amici state that no counsel for any party authored part or all of this brief and that no entity other than amici made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and letters showing such are filed with this brief in accordance with Rule 37.3.

[2] *See* 68 Fed. Reg. 68180 (Dec. 5, 2003) (Cayuga Nation of New York) and 68182 (Oneida Tribe of Indians of Wisconsin, Onondaga Nation, St. Regis Mohawk Tribe, Seneca Nation of Indians, and Tonawanda Band of Seneca Indians.)

[3] *See Cayuga Indian Nation of New York. v. Pataki,* No. 02-6111(L) (2d Cir., argued March 31, 2004) (amicus Cayuga Nation); *Oneida Indian Nation of New York v. State of New York,* 74-CV-187 (N.D.N.Y.) (amici Oneida Tribe of Indians of Wisconsin and Oneida of the Thames); *St. Regis Mohawk Tribe v. State of New York,* 82-CV-783, 82-CV-1114 & 89-CV-829 (N.D.N.Y.) (amici Mohawk Council of Akwesasne, Mohawk Nation, and St. Regis Mohawk Tribe); *Seneca Nation v. State of New York.,* 85-CV-0411 (W.D.N.Y.) (amicus Seneca Nation of Indians); and *Seneca Nation v. State of New York,* 2004 WL 2008521 (2d Cir., Sept. 9,

(Continued on following page)

Amici include tribal signatories to early treaties with the United States, including the 1794 Treaty of Canandaigua, 7 Stat. 44, which confirmed reservations for them. The Treaty of Canandaigua remains the cornerstone of relations between the signatory tribes and the United States, with federal annuities under it having been paid continuously since 1794. Felix S. Cohen, *Handbook of Federal Indian Law* at 419 (1942 ed.): "These several treaties guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and had the effect of placing the tribes and their reservations beyond the operation and effect of general state laws." Amici also include tribal signatories to the Treaty of Buffalo Creek, Treaty of January 15, 1838, 7 Stat. 550.

Many amici continue to occupy reservations that were the subject of one or both these treaties, reservations that are acknowledged by all as Indian country today. In this proceeding, Petitioner City of Sherrill [Sherrill] disputes that the Treaty of Canandaigua established the reservations confirmed there as Indian country and asserts that any such reservations were abolished by the Treaty of Buffalo Creek. Pet. Br., at 17-31, 31-39. By reason of similar histories and treaty protected rights, amici have a direct and profound interest in this proceeding.

## STATEMENT OF THE CASE

The Statement of the Case made by Sherrill fails to present the complete historical context for the issues presented here. A more complete historical context is set out below, which shows a consistent and longstanding

2004) (amici Seneca Nation of Indians and Tonawanda Band of Seneca Indians.)



disregard by New York for federal treaty and statutory protections for Six Nations' territories.

### Early federal-state conflict over relations with Six Nations

On July 13, 1775, Congress took control over relations with the Six Nations Confederacy and approved a speech to the Six Nations urging their neutrality in the impending war. *See* 2 Journals of the Continental Congress 93, 174-81 (Library of Cong. ed.). Ultimately, Congress failed to persuade the Six Nations to stand neutral. The Six Nations split internally, with significant factions of the Seneca, Mohawk, Onondaga and Cayuga Nations joining the British cause and the Oneida and Tuscarora Nations joining the American cause. *See generally* Barbara Graymont, *The Iroquois in the American Revolution,* chap. v (Syracuse U. Press, 1972). Major campaigns were fought in Oneida territory,[4] which was rendered virtually uninhabitable, and most Oneidas took refuge with the Americans at Schenectedy. *Id.* at 241-44.

The 1783 Treaty of Paris did not address relations with tribal participants in the Revolutionary War and Congress authorized federal treaty commissioners to do so. The treaty commissioners were instructed to confirm boundaries and terms of peace with the Six Nations and give particular assurances to the United States' allies:

> Sixthly, And whereas the Oneida and Tuscarora tribes have adhered to the cause of America and

[4] Oneida aboriginal territory was the frontier in New York, its eastern boundary being the same as the 1768 Line of Property division between Indian territory and white settlements. *Proceedings of the Commissioners of Indian Affairs, appointed by law for the Extinguishment of Indian Titles in the State of New York* (Albany 1861) [Hough Report], at 45.

> joined her arms in the course of the late war, and Congress have frequently assured them of peculiar marks of favour and friendship, the said commissioners are therefore instructed to reassure the said tribes of the friendship of the United States and that they may rely that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think if for their own advantage to dispose of the same.

October 15, 1783, 25 Journals of the Continental Congress 680, 687.

In March 1783, the New York Legislature adopted its first plan to acquire Iroquois territory. State commissioners were instructed to remove the Oneida and Tuscarora to western New York and displace the Seneca, Cayuga, and Onondaga from the State altogether. *See* Henry Manley, *The Treaty of Fort Stanwix, 1784,* at 28 (N.Y. 1932). The State abandoned its plan to expel the Iroquois when Congress was made aware of its plan by the federal Indian agent for the northern district. *Id.* at 31-32.

On October 3, 1784, the federal treaty commissioners appointed by Congress to negotiate for peace with the Six Nations opened the federal negotiation at Fort Stanwix. New York's Governor Clinton ordered two state commissioners to attend the negotiation, for the expressed purpose of obstructing the federal proceedings. Hough Report, at 63. Within a few days, the federal commissioners, who had been advised of the state commissioners' instructions, ordered the military officers present to refuse the admission of the state commissioners to the treaty proceedings. Manley, at 86.

The federal treaty commissioners concluded the Treaty of Fort Stanwix with the Six Nations on October 22, 1784, 7 Stat. 15. The treaty accomplished three objectives: first, it confirmed boundaries and established peace



on specified terms with the Seneca, Mohawk, Onondaga and Cayuga nations; second, it provided that "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled";[5] and third, it exacted a cession of Seneca territory as retribution for the Seneca's part in the war. Graymont, at 282. The United States confirmed all the terms of the Treaty of Fort Stanwix in the 1789 Treaty of Fort Harmar, Treaty of January 9, 1789, 7 Stat. 33.

New York persisted in its efforts to obtain Iroquois land, meeting with spectacular success in 1788 and 1789. The New York Genesee Company of Adventurers had obtained long term leases of Six Nations territories and, on the pretext of protecting them from such arrangements, the State called for the Six Nations to treat at Fort Schuyler in March 1788. The State representatives met first with the Onondaga Nation and extracted a cession; next, the State representatives met with the Oneida Nation, recommended a cession on the same terms as that just concluded with the Onondaga, and obtained the second cession.[6] "The Deeds of Cession finally obtained were upon nearly the same Basis as the Leases, in regard to Annuities and Reservations." Hough Report, at 126. The State commissioners recommended the same terms to the

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[5] At the time, the Tuscarora were guests of Oneida, residing at Oneida territory, but with no proprietary interest in Oneida territory, and with the Seneca near Fort Niagara. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 121 n.18 (1960). The Tuscarora had emigrated from North Carolina and acquired territory in New York between 1798 and 1804. *Id.* at 106 n.10.

[6] The Indian Claims Commission found that the 1788 Oneida cession to the State was obtained by deceit and fraud. *See Oneida Indian Nation of New York v. United States*, 37 Ind. Cl. Comm. 522, 530 (1978).

Cayuga Nation, which concluded a very similar cession of its lands to the State in 1789. Hough Report, at 251.

**Constitutional period federal relations with the Six Nations**

Shortly after adoption of the Constitution, Congress asserted its authority over the protection of Indian lands. With the passage of the Indian Trade and Intercourse Act on July 22, 1790, the Congress provided:

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of pre-emption to such lands or not,* unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

1 Stat. 137, § 4 (emphasis supplied) (hereafter "Nonintercourse Act"). In a speech to the Seneca leader Cornplanter, President Washington made plain that the Nonintercourse Act applied to Six Nations' territories:

> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States . . .
>
> If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.

4 American State Papers, Indian Affairs [ASPIA], Vol. 1, at 142 (1832); *see generally* Francis Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (University of Nebraska Press 1970).



Following the passage of the 1790 Act, federal officials frequently noted the necessity of federal approval for transfers of tribal lands in New York. For example, writing in 1791, Secretary of War Henry Knox, in whom the administration of Indian affairs was vested at the time, wrote that "[t]he right of the State of New York, to the preemption of the Cayuga lands is unquestioned, and also that the right embraces all possible alienations of said lands by the Indians, *with the concurrence of the United States, according to the constitution and laws.*" I ASPIA, at 169 (emphasis supplied.) And, in 1791, federal treaty commissioner Timothy Pickering repeated President Washington's earlier statement to all the Six Nations. Pickering Papers Vol. 60, at 79 (Massachusetts Historical Society).

These assurances were repeated directly to the Oneida at the negotiations on the 1794 Treaty of Canandaigua. Meeting first with the Oneida, federal treaty commissioner Pickering reiterated that the Nonintercourse Act declared that no sale of Indian lands would be valid, "unless made at a public treaty held under the authority of the United States." *Id.* at 224. Pickering then proceeded to negotiate necessary and final terms of peace with the Six Nations, because the Seneca had continued to object to the extent of land ceded to the United States at the Treaty of Fort Stanwix and threatened to join the western tribes in a general uprising against the United States. The necessary terms required a re-cession to the Seneca Nation of some portions of those lands ceded to the United States in 1784 and confirmation of all tribes' reservations. *See generally* Edward Phillips, *Timothy Pickering at His Best: Indian Commissioner, 1790-1794*, CII Essex Institute Historical Collections, No. 3, at 190-202 (1966).

The modified Seneca boundaries were set out in a separate article in the final treaty, with the other nations

or tribes' existing reservations acknowledged in another. The Seneca leaders also demanded a fresh confirmation of their lands from the United States. Pickering agreed, placing the confirmation at the close of each of the separate articles. Pickering Papers, Vol. 60, at 206A-209. In its final form, the Treaty of Canandaigua confirmed the Oneida, Onondaga and Cayuga reservations in article II, confirmed the modified Seneca boundary in article III, and gave the United States' assurance that all the signatory nations' or tribes' lands would remain theirs in the same terms at the end of both articles II and III. Finally, the treaty obligated the United States to pay an annual annuity to the Six Nations of $4,500.00, "[i]n consideration of the peace and friendship hereby established." 7 Stat. 44, art. VI.[7] The United States has continuously since 1794 made the annuity payment required by the Treaty of Canandaigua to the Six Nations members and successors. *Tuscarora Indian Nation*, 362 U.S at 118 n.17.

**New York acquisition of Six Nations' reservation land**

Even after adoption of the Constitution and passage of the Nonintercourse Act, New York continued its practice of acquiring Iroquois territory without regard to federal policy or law. In 1793 and again in 1795, the State legislature authorized its commissioners to treat for Oneida, Onondaga, and Cayuga lands. Act of March 11, 1793, 1793 N.Y. Laws, ch. 51; Act of April 9, 1795, 1795 N.Y. Laws, ch.

[7] As noted above, the Tuscarora reservation was formally established between 1798 and 1804, after the Treaty of Canandaigua. Similarly, the St. Regis Mohawk Reservation, originally excepted from a sale from the State to a private pre-emption holder, was also confirmed later by federal treaty in 1796. *See* Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55; *Handbook of Federal Indian Law*, at 423 n.69.



70. Under authority of these acts, state commissioners purported to acquire portions of the Onondaga, Oneida, and Cayuga Reservations, all without approval by the United States Senate or proclamation by the President. *See* Whipple Report, at 195, 199, 224 & 244.

From these early transactions until the mid-nineteenth century, the State entered into other transactions with nations and tribes in its borders to acquire tribal lands. *See generally* Whipple Report, Index. The majority of these transactions involved Oneida territory, but others involved Cayuga, Mohawk, Onondaga, and Seneca reservations.[8] Most of these transactions were not ratified and proclaimed as federal treaties, although a few were when particular State officials decided to comply with the Nonintercourse Act. *Id.* at 22, 249.

New York had actual knowledge of the applicability and requirements of federal law at the time it engaged in these transactions. In 1795, then Secretary of War Pickering (who had just concluded the Treaty of Canandaigua for the United States) was advised by the federal Indian agent for the northern department that New York had authorized its commissioners to meet with the

[8] There were relatively few State treaties with Seneca, even though the Treaty of Canandaigua confirmed a large territory for the Nation. This is because New York State ceded its right of pre-emption to most Seneca territory to Massachusetts in the 1786 Hartford Compact, and Massachusetts in turn sold it to private investors. As a result, the 1797 Treaty of Big Tree, in which the Seneca lost possession of the majority of their territory reserving certain reservations, was a transaction among these private investors, the Seneca Nation, and the United States. Agreement with the Seneca, September 15, 1797, 7 Stat. 601. However, New York did acquire two small portions of Seneca territory to which it had retained the right of pre-emption and authorized the sale of other portions to private individuals who had purchased the right of pre-emption from Massachusetts. *See* Whipple Report, at 17-25.

Oneida, Onondaga, and Cayuga for the purpose of acquiring tribal land. Pickering sought an opinion from the United States Attorney General William Bradford as to whether the Nonintercourse Act applied to such state transactions. Bradford responded that it did:

> The language of this act [of March 1, 1793] is too express to admit of any doubt . . . It is true, that by treaties made by the State of New York with the Oneidas, Onondagas and Cayugas, previous to the present Constitution of the United States, those nations ceded all their lands to the people of New York, but reserved to themselves and their posterity forever (for their own use & cultivation, but not to be sold, leased or in any other manner disposed of to others,) certain tracts of their said lands, with the free right of hunting & fishing &c. So far therefore as respects the lands thus reserved the treaties do not operate further than to secure to the State of New York the right of preemption, but subject to this right they are still the lands of those nations, and their claims to them, it is conceived cannot be extinguished but by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress.

Resp. App. 1a-4a; *accord* President Jefferson's response to Handsome Lake, 1802, *Avalon Project,* available at www.yale.edu/lawweb/avalon/jeffind2.htm ("when you desire to sell, even to a State, [that] an agent from the United States should attend the sale, see that your consent is freely given, a satisfactory price paid, and report to us what has been done, for our approbation.") Pickering took the precaution of sending the Attorney General's opinion to Governor Clinton, the same governor who had attempted to thwart the 1784 Treaty of Fort Stanwix. *See* page 4, *supra*; Pickering Papers, vol. 60, at 209. The State



concluded this particular and the subsequent transactions nonetheless.

**Attempted removal of the Six Nations from New York**

By the early nineteenth century, the holdings of the Six Nations had been reduced by New York from millions to less than two hundred thousand acres. Many of those Indians who were displaced as a result relocated to other reservations in the State of New York, while others looked to Indian territory outside the State. In 1815, Six Nation chiefs inquired in a formal memorial of the President whether he would agree to their acquisition of land in the Ohio territory among Indian friends and whether, in that event, "existing treaties [would] still remain in force, and annuities paid as heretofore." *Emigrant Indians v. United States,* 5 Ind. Cl. Comm. 560, 562-63 (1957). In 1816, Secretary of War Crawford responded that "removal shall in no manner change your friendly relations and existing treaties with the Government," including annuities thereunder. *Id.*; *see also* Letter of Secretary of War Calhoun to Jasper Parrish, Sub-Agent, Six Nations, May 14, 1818, W. Hemphill, ed., *The Papers of John C. Calhoun, 1817-1818,* Vol. III (1967) (Six Nations assured that land acquired in the West not intended by the United States to be in exchange for tribal lands in New York.)

Having received the requested assurances, certain of the Six Nations, denominated New York Indians in these transactions, negotiated with the Menominee and Winnebago Nations to purchase land in Wisconsin, eventually acquiring 500,000 acres. *See* Treaty with the Menominee, February 8, 1831, 7 Stat. 342. After the 1831 treaty, the United States expressed concern that Wisconsin was not well suited as a new home for the New York Indians. Department of War officials repeatedly warned that

non-Indian settlers would increase in the vicinity of Green Bay in the coming years and urged the New York Indians to relocate west of the Mississippi. *See* Report of the Secretary of War, S. Rep. No. 220, 24th Cong., 1st Sess. (1836).

To exchange the territory acquired in Wisconsin for territory in Kansas, the United States concluded the 1838 Buffalo Creek Treaty with the New York Indians. 7 Stat. 550. In its preamble, the treaty summarized the memorial sent by the Six Nations to the President in 1815 and the President's response, including the United States' commitment that existing treaties would remain in full force, as the premise for the 1838 treaty. The purpose of the treaty was to exchange land acquired by New York Indians in Wisconsin for land in the Kansas territory. Thus, article 1 ceded the Wisconsin land, except for a tract at Green Bay, and article 2 described the new tract set aside for the New York Indians. Articles 10 and 14 approved certain sales of Seneca and Tuscarora lands in New York to private holders of the right of pre-emption. No other sales of New York reservations were approved in the treaty.

The Buffalo Creek Treaty did not compel the removal of the New York Indians to the Kansas territory and the New York Indians did not, in fact, remove. *New York Indians v. United States,* 170 U.S. 1, *modified on other grounds*, 170 U.S. 614 (1898). The Seneca reservations ceded in article 10 of the treaty were restored by later federal treaties with the Seneca Nation and the Tonawanda Band of Seneca. *See* Treaty with the Seneca, May 20, 1842, 7 Stat. 586; Treaty with the Seneca, Tonawanda Band, November 5, 1857, 11 Stat. 735. The Tuscarora sale approved by the treaty was cancelled later, leaving the Tuscarora continuously in possession. *Handbook of Federal Indian Law,* at 423 n.79.



## SUMMARY OF ARGUMENT

Before adoption of the Constitution, New York aggressively asserted its so-called legislative right and extinguished title to literally millions of acres of Iroquois territory in 1788 and 1789. *See Worcester v. Georgia,* 31 U.S. 515, 559 (1832) (federal authority at the time shackled by ambiguous proviso that legislative power of any state within its own limits shall not be infringed or violated); *United States v. Forty Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876). The Founding Fathers stripped the legislative rights proviso from Congress' authority over Indian affairs in the Constitution, believing the proviso to be "absolutely incomprehensible." The Federalist No. 42, at 284 (Madison) (J. Cooke, ed. 1961). Thus, the whole power of regulating affairs with tribes, including the exclusive power to extinguish tribal title, was vested in the Congress. This exclusive federal power extends to tribal lands in New York, even though New York rather than the United States held the fee title, or right of pre-emption, to those lands. *Oneida Indian Nation v. County of Oneida (Oneida I),* 414 U.S. 661, 667, 670 (1974).[9]

Nonetheless, "New York State continued to take the same position concerning its superiority over Indian affairs after the Consitution (sic) was adopted, and after the Trade and Intercourse Act was passed." *Oneida Indian Nation of New York v. United States,* 43 Ind. Cl. Comm. 373, 377-78 (1978). The State persisted in dispossessing tribes of their lands without federal approbation, including

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[9] Amici Madison and Oneida Counties argue here that the Nonintercourse Act did not apply to the individual states. *See* Amici Madison & Oneida Counties Br., at 13. New York made this identical argument as amicus before the Supreme Court in *Oneida I* and the Supreme Court squarely rejected it. Amicus Curiae State of New York, at 10-22; *Oneida I,* 414 U.S. at 670.

an 1805 transaction with the Oneida Nation that purported to cede the land that Sherrill asserts it can tax.

Now, Sherrill argues that the Oneida Reservation is a state, not a federal, reservation, and for this and other reasons is not subject to the protection of federal law. These arguments come far too late in the day of Iroquois/New York relations to be credible. The literal language of the Treaty of Canandaigua and the admitted federal reservation status of the similarly created Onondaga Reservation disprove the claimed state law status of the Oneida Reservation. Further, this Court's *Oneida II* decision forecloses Sherrill's construction of the Nonintercourse Act as inapplicable to the Oneida Reservation. Holding that federal common law principles codified in the Act precluded the alienation of Oneida land without the approbation of the United States, the Court effectively determined that the Act applied to New York reservations. *Oneida II*, 270 U.S. at 240 (1985). Federal officials, including President Washington, so stated at the time. Thus, Sherrill's claimed authority to tax the subject land runs squarely into the federal reservation status and restraints against alienation of the subject land.

The status of the federal Indian reservations in New York was not altered by the 1838 Buffalo Creek Treaty. The Buffalo Creek Treaty did not compel removal and did not abolish the tribes' reservations in New York. Instead, the treaty contemplated that, were the New York Indians to remove, separate transactions respecting their lands in New York would take place, which transactions would comply with the Nonintercourse Act. These events did not occur and the New York nations and tribes remain in New York today. *See New York Indian v. United States*, 170 U.S. 1 (1898).



## ARGUMENT

### I. The Six Nations and successor tribes occupy Indian country in New York State that is subject to federal treaty and statutory restraints against extinguishment.

#### A. The Treaty of Canandaigua confirmed federal Indian reservations for the tribal signatories thereto.

By its express terms, the Treaty of Canandaigua "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property;" 7 Stat. 44, art II. A plainer expression of federal intent to recognize an Indian reservation is difficult to imagine. *Compare Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 350 (1945) (treaty provision acknowledging territory to be that of signatory tribe recognizes reservation); *United States v. Shoshone Tribe*, 304 U.S. 111, 113 (1938) (treaty providing territory "shall be and the same is set apart for the absolute and undisturbed occupation . . . ")

As to the Oneida Nation in particular, the federal purpose in securing the reservation was pointed and powerful. The Oneida had fought as an American ally in the Revolutionary War and had suffered grievously as a result. In the trilogy of treaties concluding with the Treaty of Canandaigua, Congress made clear that it secured the Oneida Nation in its territory out of gratitude for Oneida loyalty during the Revolution. This was appropriate in light of the displacement of the Oneida from their territory during the war and the obvious and continuing designs of New York State upon Oneida territory. *See* page 3, *supra*. Notwithstanding Sherrill's contrary conclusion, Congress' "peculiar marks of favour and friendship" for its Oneida

ally constitutes sufficient federal purpose for the set aside in the Treaty of Canandaigua. *See* Pet. Br., at 23-24.

Were there any doubt, the similar historical origin of the Onondaga Reservation, an admitted federal Indian reservation, with that of the Oneida Reservation concludes the matter. In March 1788, New York invited the Six Nations to meet with state commissioners to consider leases of Six Nations territory obtained by private individuals. *See* Hough Report, at 118-128. The meeting took place in August 1788 at Fort Schuyler. Because Onondaga arrived first, the State negotiated first with the Onondaga Nation, concluding a treaty on September 12. Whipple Report, at 190. Article I of the Onondaga treaty purported to cede all Onondaga lands to New York State and article II described an area reserved for exclusive Onondaga use and occupation out of the so-called ceded lands. *Id.*

The State commissioners then turned their attention to Oneida. The State commissioners described the Onondaga treaty to the Oneida and recommended that the Oneida enter into a similar arrangement. Hough Report, at 212-13. The Oneida did so on September 28, 1788. Whipple Report, at 237. As had the Onondaga treaty, the Oneida treaty purported to cede all Oneida land to the State in article I and article II described an area reserved for exclusive Oneida use and occupation out of the so-called ceded land. *Id.*[10]

[10] Sherrill relies on these articles as having established a state reservation that is not subject to federal supervision. Pet. Br., at 20-22. This construction is not credible on its face, inasmuch as it runs counter to the basic understanding of aboriginal title. However it might be labelled, the Oneida retained the exclusive right of possession to the reservation in the 1788 state treaty, a right sufficient to invoke the protection of federal common law. *Oneida I,* 414 U.S. at 667-68, (right of occupancy recognized in Indians, a right sometimes called Indian title, which right could only be terminated by the United States. It is the

(Continued on following page)



Despite its first appearance in a 1788 state treaty, the Onondaga Reservation has since appeared as a federal Indian reservation on authoritative maps. *See, e.g.,* United States Department of the Interior, Bureau of Land Management, Cadastral Survey, American Indian Reservations and BIA Regional, Agency and Field Offices.[11] It has since been treated as a federal Indian reservation by the United States. *See* 1935 Memorandum for Assistant Attorney General Blair, Re: Onondaga Reservation ("The Reservations within the State of New York are in the same status as other Indian Reservations in the United States.") And it has since been treated as a federal Indian reservation by the courts of New York. *See Pierce v. State Tax Commission,* 286 N.Y.S.2d 162 (N.Y., App. Div. 1968) (application of state sales tax on Onondaga Reservation pre-empted by federal authority); *Andrews v. New York,* 79 N.Y.S.2d 479 (N.Y. Ct. Cl. 1948) (state court jurisdiction over land disputes on Onondaga Reservation pre-empted by federal law); and *Lyons v. Lyons,* 149 Misc. 723 (Sup. Ct. Onondaga Co. 1933) (state probate law on Onondaga Reservation pre-empted by federal law.)[12] These same rules of

possessory interest that federal law protects, even where that right of occupancy is not based on action by the United States. *Oneida II,* 470 U.S. at 236.

[11] This map is available at the agency's official web-site: http://www.blm.gov/cadastral/biamaps/biaoffices.htm. This map also shows the St. Regis Mohawk Reservation as a federal Indian reservation, notwithstanding the fact that it was originally reserved in a sale by New York to a private individual and later confirmed by federal treaty, similar to the Onondaga and Oneida reservations. *See* n.7, *supra.*

[12] In *People ex rel. Cusick v. Daly,* 212 N.Y. 183 (1914), the New York Court of Appeals explicitly rejected the state reservation distinction with regard to the Tuscarora Reservation, created largely by purchase by the Indians:

> "The fact remains, however, that Congress has always asserted and exercised the right to legislate in all Indian affairs, and its power to do so has been upheld by the Supreme Court in a case involving the validity of the very

(Continued on following page)

federal pre-emptive authority also apply to the federal treaty confirmed Oneida Reservation, notwithstanding its historical origin in a 1788 state treaty.

### B. Federal common law and statutory restraints against alienation apply to the Oneida and other treaty confirmed reservations in New York.

This Court resolved the question of the applicability of federal common law restraint against alienation to the Oneida Reservation in *Oneida II*. In that action, the Oneida plaintiffs challenged the legality of the 1795 transaction between New York and the Oneida based on federal common law and the Nonintercourse Act. The plaintiffs sought trespass damages for the two years preceding the filing of the complaint, 1968 to 1970. *Id.* at 229. Initially, the action was dismissed for lack of federal question, a holding that was ultimately reversed by this Court unanimously. *Oneida I, supra*. On remand and after further proceedings, the district court entered judgment for the Oneida plaintiffs and awarded trespass damages in the amount of $16,694. *Oneida II*, 470 U.S., at 230.

In its second consideration of the case, this Court in *Oneida II* acknowledged that the Oneida Reservation had been reserved in a 1788 treaty with New York State. *Id.* at 231. Nonetheless, the Court held that the reservation was protected by federal common law against state

statute now under consideration. (*U.S. v. Kagama, supra.*) *It is said that there is a difference between the Indians whose reservations are the direct gift of the Federal government and those whose reservations have been derived from the state or from other sources. We find no such distinction in the statute, and we can think of none that logically differentiates one from the other.*"

(emphasis supplied.) *Id.* at 371.



extinguishment of Oneida possessory rights without federal consent, principles codified in the Nonintercourse Act. *Id.* at 236, 240. The Court further held that the defenses asserted against the Oneida claim lacked merit and affirmed the judgment in favor of the Oneida under federal common law. *Id.* at 240, 253.[13]

By affirming a judgment based on federal common law principles codified in the Nonintercourse Act, this Court clearly implied that the statute applied to the Oneida and other reservations in New York State. This statutory policy was carried forward in all subsequent re-enactments without major change, including the 1802 version of the Act that was in effect when New York purported to extinguish Oneida title to the subject land here. *See Oneida I,* 414 U.S. at 668 n.4.

The criminal provisions of the 1802 Act encompassed lands allotted to, belonging to, *or secured by treaty with the United States* – plainly including reservations such as those secured by articles II and III of the Treaty of Canandaigua. *See* Act of March 30, 1802, 2 Stat. 390, §§ 2, 3, 4 & 5. The all-important prohibition against purchase of tribal lands included a criminal provision for violation of the prohibition with the following proviso:

> Provided, nevertheless, that it shall be lawful for the agent or agents of any state, who may be

[13] This Court also explicitly rejected the notion that tribal land transfers could be ratified absent a plain and unambiguous expression of Congress' intent to extinguish tribal title. *Oneida II*, 470 U.S. at 247-48. The suggestion by amici, then, that there has been implicit approval of state treaties acquiring Oneida land is wrong as a matter of law. *See* Brief of Amici Town of Lenox *et al.*, at 8 n.10. And as noted above, this Court expressly affirmed the judgment holding the 1795 state treaty void, the counties liable for trespass, and awarding monetary damages for the counties' trespass. *Oneida II,* 470 U.S. at 253. Thus, the argument of amici that the *Oneida II* decision did not resolve issues of present day rights and remedies is also wrong. *See* Brief of Amici Town of Lenox *et al.*, at 11.

> present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

*Id.* § 12. This proviso effectively lays out how states that hold claims to tribal lands (the right of pre-emption) can proceed to acquire such lands, i.e., through a treaty held under authority of the United States, thereby indicating tribal lands cannot be acquired by states otherwise.[14]

Neither do any terms of the Treaty of Canandaigua constitute pre-approval of tribal land by the State for purposes of the Nonintercourse Act. *See* Pet. Br., at 27. Articles II and III of the treaty provide that the reservations secured for the nations or tribes "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." This merely refers to the entities who have the right to make the purchase-private interests in the case of Seneca land and the State in the case of other reservations. It does not indicate that the confirmed reservations have been exempted from the statutory restraint against alienation. To the contrary, federal treaty commissioner Pickering advised the Oneida at the Canandaigua negotiation that a sale of their land required a public treaty under the

[14] Amici Madison and Oneida Counties argue that post-1790 versions of the Nonintercourse Act did not apply within the jurisdiction of individual states because of the so-called surrounded by settlements proviso. Brief of Amici Madison and Oneida Counties, at 12-13. This Court rejected this limited construction of the Act in *Oneida I*, holding that the federal principles embodied in the Act applied to the original thirteen states. 414 U.S. at 670.



authority of the United States – in other words, compliance with the Nonintercourse Act.

It is undisputed here that New York did not comply with federal common law or the Nonintercourse Act in 1805 when it purported to extinguish Oneida title to the subject lands, a portion of the federally confirmed Oneida Reservation. As a result, Oneida title to the subject lands has not been extinguished and those lands are part of the federally confirmed Oneida Reservation, or Indian country.[15]

## II. The 1838 Buffalo Creek Treaty was not a mandatory removal treaty and did not result in removal of the New York Indians.

The hallmark of mandatory removal treaties under the 1830 Indian Removal Act, 4 Stat. 411 (May 28, 1830), was the extinguishment of Indian title in the treaty by the United States. While removal served as the backdrop to the Buffalo Creek Treaty, its structure was different from that of mandatory removal treaties. Extinguishment of Indian title under Buffalo Creek would occur, if at all, in separate voluntary agreements between the Indians and New York or individual purchasers of the right of pre-emption, subject to the requirements of the Nonintercourse Act. The treaty, however, never actually effected removal of the New York Indians.

[15] *See* 18 U.S.C. § 1151(a), which by its express terms includes reservations under the jurisdiction of the United States as Indian country. This Court has adopted this statutory definition for all purposes, including the availability of the per se rule against state taxation of Indian property within Indian country. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

### A. Mandatory removal was generally accomplished by extinguishment of title by the United States.

The roots of the removal policy are found in the 1802 Compact between Georgia and the United States, by which Georgia ceded its claims to western lands in exchange for the United States' agreement to "extinguish, for the Use of Georgia, . . . peaceably . . . and on reasonable terms, the indian Title" to lands in Georgia. Articles of Agreement and Cession, art. 1 (April 24, 1802), *reprinted in Territorial Papers,* V, at 142-144. Almost without exception, the removal treaties that followed, both in the southern and "northwest" states, provided for the extinguishment of Indian title by the United States in exchange for new lands in the west. The Cherokees, for example, "cede[d] to the United States" certain of their "lower town" lands in exchange for lands on the Arkansas and White Rivers. Treaty with the Cherokee, July 8, 1817, art. 1, 7 Stat. 156. The Delawares agreed to "cede to the United States all their claim to land in the state of Indiana." Treaty with the Delawares, October 3, 1818, art. 1, 7 Stat. 188.[16]

Many of the early treaties lacked a date certain for removal, and the slow pace of actual removal frustrated the southern states, particularly Georgia. In response, Congress, with strong encouragement from President Jackson, sought to legislatively enforce the removal policy. *See* Message of President Jackson, Dec. 8, 1929, *reprinted in* Richardson, *Messages and Papers of the President,* II, 456-59; Prucha, *American Indian Policy,* at 237-44. The

[16] *See also, e.g.,* Treaty with the Kickapoo, July 30, 1819, art. 1, 7 Stat. 200 (the Tribe agreed to "cede and relinquish to the United States for ever, all their right, interest, and title of, in, and to, the following tracts of land . . . "); Treaty with the Creeks, January 24, 1826, art. 2, 7 Stat. 286 ("The Creek Nation of Indians cede to the United States all the land belonging to the said Nation in the State of Georgia . . . ").



Jacksonian view was that Indian tribes were no more than tenants at will who could be removed from their lands at any time deemed appropriate by the states. *See, e.g.,* H.Rep. No. 227, 21st Cong., 1st Sess. (1830). The congressional debate on the Removal Act focused on the issue of the nature of the Indians' property right, with senators and congressmen from the south arguing in favor of the Jacksonian view and in support of the removal policy, and those from the northeast arguing passionately in support of Indian title and against removal. *Compare* Statement of Sen. Forsyth (Ga.), 6 Cong. Deb. 325-39 (1830) *with* Statement of Mr. Huntington (Conn.), *id.* at 4-18 (Omitted Speeches). *See also* Prucha, *American Indian Policy,* at 239-40. Within two years, the Supreme Court had repudiated the view that Indian tribes held no more than a tenancy at will subject to defeasance by the states. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). Implementation of the removal policy, therefore, continued to be carried out through extinguishment of Indian title by treaty.

Virtually all of the approximately thirty Removal Act treaties included a clear extinguishment of title to the lands from which the Indians were being removed, except for lands specifically reserved therein. For example, soon after passage of the Removal Act, the Choctaw Nation "consent[ed] and . . . cede[d] to the United States, the entire country they own[ed] and possess[ed], east of the Mississippi River. . . . " Treaty with the Choctaw, September 27, 1830, art. III, 7 Stat. 333. Similarly, the Winnebago Nation "cede[d] to the United States, forever, all the lands, to which said nation have title or claim. . . . " Treaty with the Winnebago, September 15, 1832, art. I, 7 Stat. 370. In 1835, the Cherokees "cede[d] relinquish[ed] and convey[ed] to the United States all the lands owned claimed or possessed by them east of the Mississippi River . . . "

Treaty with the Cherokee, December 29, 1835, art. 1, 7 Stat. 478.[17] No similar cessions of land in New York were obtained in the Buffalo Creek Treaty.

### B. Unlike mandatory removal treaties, the Buffalo Creek Treaty did not compel removal through extinguishment of title by the United States and did not abolish the reservations in New York.

#### 1. The treaty was intended and understood as setting aside lands in Kansas for voluntary removal.

The Buffalo Creek Treaty was not considered a mandatory removal treaty by either the New York Indians or the United States. As stated by the Oneida in a memorial to President Monroe on November 11, 1818: "your petitioners assented to the said memorial, not intending or understanding that they had in any way committed themselves as to the time they might elect to remove to the west – for your practitioners considered the

[17] *See also, e.g.*, Treaty with the Creeks, March 24, 1832, art. 1, 7 Stat. 366 ("The Creek tribe of Indians cede to the United States all their land, East of the Mississippi River."); Treaty with the Chickasaw, October 20, 1832, art. I, 7 Stat. 381 ("the Chickasaw nation do hereby cede, to the United States, all the land which they own on the east side of the Mississippi River, including all the country where they at present live and occupy."); Treaty with the Chippewa, September 26, 1833, art. 1st, 7 Stat. 431 ("the United Nation of Chippewa, Ottawa, and Potawatomie Indians, cede to the United States all their land, along the western shore of Lake Michigan, and between this Lake and the land ceded to the United States by the Winnebago nation . . . supposed to contain about five millions of acres."); Treaty with the Potawatomi, February 11, 1837, art. 1, 7 Stat. 532 ("hereby cede to the United States all their interest in said lands, and agree to remove to a country that may be provided for them by President of the United States, southwest of the Missouri River . . . ").



western lands more as a retreat for their children than as a present residence for themselves." Memorial of Oneida Indians to President of the United States, National Archives RG279, *Records of the Indian Claims Commission*, Docket No. 301, Box 2674, Claimant's Exh. 2083. In May of that same year, Secretary Calhoun wrote to Jasper Parrish, Sub-Agent of the United States that "certain persons from interested motives have induced the Indians of the Six Nations to believe, that should they emigrate and settle on lands belonging to some of the Indians to the West, the lands which they would acquire, would be in lieu, or exchange of that which they now hold in New York. This is not intended by the President. . . . " Letter of Secretary of War Calhoun to Jasper Parrish, Sub-Agent, Six Nations, May 14, 1818, W. Hemphill, ed., *The Papers of John C. Calhoun, 1817-1818*, Vol. III (1967); *see also Oneida Indian Nation of New York v. United States,* 43 Ind. Cl. Comm. at 447.[18]

The voluntary nature of removal under the Buffalo Creek Treaty is directly reflected in the instructions to R.H. Gillet, the federal commissioner who negotiated the treaty. The instructions provide that "[a]s fast as any considerable number are prepared to go, they shall be removed & subsisted, & a district of the reservation west, assigned to them, & a just proportion of their lands in New York, yielded to the persons entitled thereto." Brief of Instructions for Meeting with New York Indians, National Archives Microfilm Collection, M234, reel 583, frames 540-41. Thus removal was to occur only when the Indians

[18] Calhoun consistently made it clear that while he believed removal to be advantageous, it would be accomplished only with the consent of the Indians. *Id.*

"[were] prepared to go," and only when they yielded their lands "to the persons entitled thereto."[19]

The treaty as presented to the Senate was amended, necessitating the further consent of the New York Indians. *New York Indians*, 170 U.S. at 5 n.1, Finding of Fact 10. In seeking the consent of the Oneida, Commissioner Gillet again confirmed the voluntary character of the treaty:

> the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York to the west of the State of Missouri or elsewhere unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. They can if they choose to do so remain where they are forever. The treaty gives them lands if they go to them & settle there but they need not go unless they wish to. When they wish to remove they can sell their lands to the Governor of the State of New York & then emigrate. But they will not be compelled to sell or remove.

Statement of Ransom H. Gillet at Oneida Castle, August 9, 1838, JA 146.

Consistent with the voluntary terms of the treaty, the Government never took steps to compel removal of the New York Indians to Kansas. *See State of New York ex rel. Cutler v. Dibble*, 62 U.S. 266, 370 (1858) ("by this case, it is admitted that the Indians have not been removed by the United States"); *see also New York Indians*, 170 U.S. 1. Removal under the treaty, if such was to occur, required

[19] *See also* Article 3 of the treaty: "such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States."



extinguishment of title through separate transactions which either did not occur or were never effectuated.

**2. The treaty contemplated separate transactions to extinguish title which never occurred or were modified; as a result, the New York Indians were never removed and remain in New York today.**

At the time of the 1838 treaty, the Seneca, Onondaga, Oneida, Cayuga, Tuscarora, and St. Regis Mohawk each possessed a reservation in New York. *See New York Indians*, 170 U.S. at 5 n.1, Finding of Fact 7. Unlike the mandatory removal treaties discussed in part A, removal under Buffalo Creek required a two-step process: the setting aside of the Kansas lands by the United States in the treaty; and extinguishment of title in separate agreements with the State or private land speculators who held the right of pre-emption subject to the requirements of the Nonintercourse Act. Two separate transactions involving the Seneca and Tuscarora, which are referenced in and annexed to the Buffalo Creek Treaty, illustrate the additional steps contemplated by the treaty as necessary to extinguish title and effect removal. But even these separate agreements proved ineffectual to extinguish those nations' interests and no removal occurred.

In the Seneca agreement, which was negotiated before and approved by a federal commissioner, the remaining Seneca reservations at Buffalo Creek, Tonawanda, Cattaraugus and Allegany, were purchased by Thomas Ogden and Joseph Fellows, the pre-emption right holders. Almost immediately, however, the Seneca protested the treaty as a fraud engineered by Ogden and Fellows. *New York Indians* at 543, Finding 11. *See also* Frederick Houghton, "The History of the Buffalo Creek Reservation," in Frank H.

Severance, ed., *Publications of the Buffalo Historical Society*, Vol. 24, 1920. The Seneca continued their protests until a compromise was negotiated in 1842 by which Ogden and Fellows purchased the Buffalo Creek and Tonawanda Reservations, but the Cattaraugus and Allegany Reservations were retained by the Seneca. Treaty with the Seneca, May 20, 1842, 7 Stat. 586.[20] *See Fellows v. Blacksmith*, 60 U.S. 366, 370 (1856). The Tonawanda Reservation was subsequently restored in the Treaty with the Seneca Tonawanda Band, November 5, 1857, 11 Stat. 735. *See State ex rel. Cutler v. Dibbler*, 52 U.S. at 370. Today, the Seneca continue to reside on the Cattaraugus, Allegany, and Tonawanda Reservations.

In the Tuscarora agreement, Ogden and Fellows also purchased the Tuscarora Reservation in Niagara County. This agreement was similarly made in the presence of and approved by a federal commissioner. Like the Seneca, the Tuscarora almost immediately protested the treaty as fraudulent. *See New York Indians*, 170 U.S. at 5 n.1, Finding 11. In 1849, the Tuscarora Chiefs brought a lawsuit in state court against the successors to Ogden and Fellows seeking a surrender and cancellation of the deed because the expected removal under the 1838 treaty never occurred. The state court canceled the deed, *see* H. Doc. No. 1590, 63rd Cong., 3rd Sess. 12-13 (1915); Cohen, *Handbook of Federal Indian Law* at 423, n.79, and the Tuscarora continue to reside on the Tuscarora Reservation. *See F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99.

[20] The remaining provisions of the 1838 Treaty continued to be applicable to the Senecas, *see Fellows v. Blacksmith*, 60 U.S. at 370, but the time for removal was extended until 1846, *see The New York Indians*, 72 U.S. 761, 770 (1866). This interpretation confirms the voluntary (or non-mandatory) nature of the 1838 Treaty. The Senecas could retain their Allegany and Cattaraugus Reservations in New York, yet still choose to move to Kansas.



By 1846, few Indians had removed to the Kansas lands and the Indian commissioner called a council of the Seneca, Cayuga, Onondaga, and Tuscarora to "learn the final wishes of the Indians as to emigration." *See New York Indians*, 170 U.S. at 5 n.1, Finding 13. The commissioner reported that the chiefs were "unanimous in the opinion that scarcely any Indian who wished to emigrate remained." *Id.* By 1860, the United States returned the Kansas lands to the public domain, and surveyed and sold them, *id.*, Finding 15, making removal impossible after that time.

The Buffalo Creek Treaty undoubtedly established a process and the means for the New York Indians to move to Kansas, if the Indians chose to so move. As a factual matter, however, only a few individuals actually moved to Kansas, and the tribes continued to reside, and still reside on their New York reservations.[21] Thus, the reservations for the New York Indians secured by the Treaty of Canandaigua and similar federal treaties were not abolished by the Buffalo Creek Treaty.

## CONCLUSION

For these reasons, amici support Respondents Oneida Indian Nation of New York *et al.* and urge the Court to affirm the judgment below.

[21] The treaty did not disturb the St. Regis Mohawks' title or occupancy of their reservation on the St. Lawrence River. In a supplement to the Treaty dated February 13, 1838, 7 Stat. 561, St. Regis assented to the Treaty provided: "that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country [Kansas] at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove." The Mohawks never removed and continue to reside on their reservation today.

Respectfully submitted,

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# In the Supreme Court of the United States

CITY OF SHERRILL, NEW YORK, PETITIONER

*v.*

ONEIDA INDIAN NATION OF NEW YORK, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE

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## INTEREST OF AMICUS CURIAE

The Amicus Curiae, Citizens Equal Rights Foundation (CERF) is a foundation established by Citizen's Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states, including the State of New York. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact the constitutional rights of citizens. CERF questions whether there is any constitutional authority to remove lands from state jurisdiction unless the land is directly acquired by the United States or a foreign state for government purposes. CERF has a critical interest in this case because CERA has members who own various assets and pay property taxes on fee lands within the original boundaries of various Indian reservations in the United States. The residential property of one of CERA's members is within the original Oneida reservation in close proximity to land reacquired by the Oneida Indians.

All parties have consented in writing to the filing of this Amicus Brief. [1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

This brief focuses on whether the Federal District Court and Second Circuit Court of Appeals properly designated lands purchased by the Oneida Indian Nation as Indian country to negate property taxes assessed by the City of Sherrill. The district court and Second Circuit Court of Appeals concluded that the "reservation" acknowledged in the Treaty of Canandaigua and protected by the Nonintercourse Act, 25 U.S.C. § 177 was sufficient to allow these lands to be designated as "Indian country" because the Oneida Indian Tribe purchased the parcels. The City of Sherrill properly raises *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) to refute designating these lands Indian country. The Second Circuit applied precedents from federal reservations of public domain land to denominate these parcels Indian country to remove them from state jurisdiction.

The history of federal Indian common law includes federal war powers. The incorporation of the war powers into federal Indian common law explains the loss of constitutional rights when an area is designated Indian country.

The Oneida Indian Nation and its individual members raise 42 U.S.C. § 1983 and federal common law to remove these lands from state jurisdiction. This Court should restrict itself and the lower federal courts from abusing federal Indian common law by applying the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 817 (1938) as was just done in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004), to this Indian federal common law case. The federal courts improperly accepted removal from the state court tax enforcement proceedings. The



lower federal court decisions should be vacated and the case dismissed.

## ARGUMENT

The land parcels purchased by the Oneida Indian tribe are not Indian country and are subject to taxation by the City of Sherrill. This brief explains how the three distinct constitutional clauses, which are the basis of federal Indian law were confused by the lower federal courts in this case to incorrectly designate these parcels of land Indian country. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, is the only clause properly applied in New York today. The Treaty Clause, Art. II, Sec. 2, Cl. 2, applies only to this case in interpreting the effects of the 1794 Treaty of Canandaigua (7 Stat. 44) and 1838 Treaty of Buffalo Creek (7 Stat. 550). The Property Clause, Art. IV, Sec. 3, Cl. 2, which concerns federal territorial lands owned by the United States has never applied in New York, one of the original thirteen colonies. The Oneida Indian Nation argued for removal of this state property tax case to federal court by claiming that their original reservation of state land should be treated as being a federal Indian reservation subject to the federal land laws pursuant to the Property Clause.

The argument begins with the application of the *Village of Venetie* analysis and its definition of Indian Country to the facts of this case. This brief will then place the tribal and federal positions into historical context to address the problems of federal common law eviscerating private property rights, civil rights and state due process. It will conclude by examining the standing of the Oneida Tribe and its individual members to invoke through assertions of 42 U.S.C. §

1983 and federal common law the discretion of the federal courts to hear this claim to remove these parcels of land from the State of New York as Indian country.

## I. THE LOWER FEDERAL COURTS ERRED IN FINDING THESE DISPUTED PARCELS OF LAND ARE INDIAN COUNTRY

### A. Under the reasoning of *Alaska v. Native Village of Venetie* these disputed parcels of land are not Indian country.

The term Indian country is defined in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). The unanimous opinion merged the old federal common law definitions with the statutory version of Indian country defined by Congress in 1948 as 18 U.S.C. § 1151. According to the opinion, the federal courts are empowered to designate three types of land to be Indian country (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments. For an area to be Indian country there must be (1) a federal set aside of land for tribal use, and (2) federal superintendence. *Id.* at 526-7.

Defining the land as Indian country operates to remove primary state jurisdiction previously granted when the federal public land was opened for sale or settlement. *South Dakota v. Yankton Sioux Tribe*, 522



U.S. 329, 343 (1998). It is uncontested that the land parcels in dispute are not Indian allotments. The facts of this case do not fit into either remaining category of Indian country because the modern definitions are federal public land terms. As discussed in Felix Cohen's Handbook of Federal Indian Law, the term Indian country was developing and was not defined until the Indian Trade and Intercourse Act of 1834. F. Cohen, Handbook of Federal Indian Law, 29-34, (1982 ed.). The Second Circuit designated the disputed parcels of land as Indian country without ever applying the facts to this Court's definition of Indian country.

The land area in dispute was originally set aside for the Oneida Indians as a reservation by the State of New York in 1788 in the Treaty of Fort Schuyler. The Treaty of Fort Schuyler contains a complete cession of the Oneida's aboriginal land area in the State of New York giving it fee title to all the ceded lands as an original colony. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). The State of New York accepted the cession and set aside approximately 300,000 acres of its state land to make up the reservation acknowledged in the 1794 Treaty of Canandaigua. The land parcels currently assessed by the City of Sherrill are located within these original 300,000 acres of state land but not within the 32 acres still reserved by New York for the Oneidas. None of the original state reservation lands are or have ever been held in trust status under 25 U.S.C. § 465 or any other federal land designation. This state set aside land was not ever territory of the United States according to the federal district court or Second Circuit. See *United States v. Boylan*, 256 F. 468, 491 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2nd Cir. 1920).

Article 2 of the Treaty of Canandaigua recognized the 300,000 acres reserved to the Oneida by the State of New York in 1788 "to be their property" and stipulates that the said reservation shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase. (7 Stat. 44). This language, as the *Boylan* courts and this Court has ruled, merely subjects the state reservation lands to the restraint against alienation under the Nonintercourse Act, 25 U.S.C. § 177. At most, the Oneida Indians have the possessory right of occupancy also known as Indian title. The United States has never claimed in the Nonintercourse cases or in its Amicus Brief filed in this case that the state lands, which were reserved for the Oneida Indians and have always been treated as state lands, were under federal jurisdiction by operation of the Treaty of Canandaigua or the Nonintercourse Acts.

According to the opinion of the Court in *Venetie*, the Indian country statute, 18 U.S.C. §1151(a), requires an Indian reservation to be under federal jurisdiction in order to be designated Indian country. An Indian reservation under federal jurisdiction is the modern legal term developed for reservations of federal public domain land for an Indian tribe preserved in federal territorial status under the Property Clause, Art. IV, Sec. 3, Cl. 2. Therefore, an historical Indian reservation is assumed to have never come under state jurisdiction unless expressly diminished or dissolved by Congress. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

The term "reservation" as used in the Treaty of Canandaigua has none of the meaning of the legal term "Indian reservation" discussed in *Yankton Sioux*. The term "reservation" was used as a general classification



through the Nineteenth and into the Twentieth Centuries, not as a specific legal term. As *Yankton Sioux* makes plain, it was understood that Congress at the turn of the Twentieth Century failed to be meticulous in its intent to modify reservation status. Congress still assumed reservations were temporary and did not precisely determine which lands were in or out of the reservation in legislation. It was not until the "reservations" were deemed to be perpetual in the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., that the federal lands term was required to become legally precise to decide jurisdictional disputes between sovereigns. *Yankton* at 343-4. See also F. Cohen, Handbook of Federal Indian Law, 34-38 (1982 ed.), explaining the term "reservation" for purposes of Indian country.

The Treaty of Canandaigua was entered into at the end of the Eighteenth Century before any formal Indian policy was developed by the United States. To assume that the use of the word "reservation" in the Treaty of Canandaigua engenders Congressional intent to create a federal reservation and encompassed the formal meaning and Congressional intent of the legal term of the 1940's is inappropriate. See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004). Yet, this is exactly the basis of the Second Circuit calling the Oneida land parcels Indian country as fully acknowledged in Respondent's Brief In Opposition. Respondent's Brief In Opposition (Br. in Opp.) at p. 10 citing the Second Circuit Opinion A23-28.

The Second Circuit is completely and clearly erroneous to cite *United States v. John*, 437 U.S. 634, 638-47 (1978) for the proposition that "by its nature" the Oneida reservation in 1794 "was set aside by Congress for Indian use under federal supervision." Opinion at

A25. As explained in *United States v. John*, the only way that lands ceded to the state could have been made into a federal Indian reservation post 1934 was for the United States to actually purchase the land, placing it under trust status to remove it from the jurisdiction of the state as done for the Mississippi Choctaw. *Id.* at 645-6. The Treaty of Canandaigua does not include any provisions for the United States to purchase the property from the State of New York on behalf of the Oneida tribe. Nor has Congress ever passed any legislation to purchase lands for the Oneida Indians in the State of New York.

The United States argues that the set aside made by the State of New York when federally acknowledged in the Treaty of Canandaigua vested an ownership interest in the Oneida tribe implying the land is a federal Indian reservation for purposes of defining Indian country. The United States relies on the court of appeals federal common law designation "that the properties are within the historic reservation land set aside for the tribe in the Treaty of Canandaigua." Cynically, the United States says that Congress has never changed the reservation status of the land. See Amicus Brief of the United States at p. 18.

These parcels of land purchased by the Oneida Indians within the original 300,000 acres set aside by the State of New York are not an Indian reservation under federal jurisdiction qualified to become Indian Country under federal common law or 18 U.S.C. § 1151. These parcels have never been federally set aside and are not and never have been under any direct federal superintendence. In fact, the district court opinion in *Boylan* cites to the federally approved appointment of a state superintendent to prevent the sale of the remaining Oneida lands under section 3, chapter 185 of



the Laws of New York approved April 18, 1843. *United States v. Boylan*, 256 F. 468, 476-7 (N.D.N.Y. 1919). As the *Boylan* courts made clear, the federal restriction on alienation did nothing to change the fee title of the lands held by the State of New York. *United States v. Boylan*, 265 F. 165, 173 (2nd Cir. 1920). The 300,000 acres of land set aside by the State of New York has always been under primary state jurisdiction.

Both the Oneida and the United States only claim to federal superintendence over these disputed parcels of land is that they have been restricted from alienation under the Nonintercourse Act. Lands being restricted from alienation was one factor for this Court to find the lands of the Santa Clara Pueblo to be Indian country in *United States v. Sandoval*, 231 U.S. 28 (1913). However, the opinion in *Sandoval* makes quite clear that federal superintendence over the private fee lands of the Pueblo only attaches because additional contiguous federal public lands have been reserved to the Pueblo as their reservation to give the United States superintendence over all of their property. *Id.* at 39.

The Court in *Sandoval* intermixed the federal land definitions of "reservation" and "dependent Indian community" to designate the Pueblos "Indian country." *Id.* at 39. Unlike the Pueblo Indians, the Oneida Indians were fully integrated into the citizenry of New York from the signing of the 1788 Treaty of Fort Schuyler. *Boylan*, 256 F. at 477-8. They were not uncivilized Indians living separate and apart from general society on territorial lands. *Sandoval* at 39.

Because these 300,000 acres of land have never been a federal Indian reservation under the federal public land laws of the United States they have never been subject to extinguishment, diminishment or

disposal by Congress under the Property Clause. Public land law decisions concerning lands that have been extinguished or diminished from a federal reservation may provide an example in this case. For example, the holding in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), that lands purchased by tribal members within the former exterior boundaries of the reservation were deemed taxable unless properly placed into actual trust status under 25 U.S.C. § 465, should apply with even more force on the Oneida parcels that cannot have any "reserved" federal territorial rights. See generally *United States v. Winans*, 198 U.S. 371 (1905), *Winters v. United States*, 207 U.S. 564 (1908).

The City of Sherrill has been forced to defend its authority to tax property that has never been federal land in federal court against modern federal Indian common law cases. New York is not a public lands state and obviously has not understood how to address the very aggressive claims of the Oneida Indians and United States to reestablish Indian territory ceded to New York before the adoption of the Constitution. The federal Indian common law doctrine of "reserved" federal territorial rights that has plagued the Western United States has no application to these lands in New York. Federal public land law decisions asserting federal territorial rights are not applicable to this case. The reservation for the Oneida set aside by the State of New York in 1788 is not a reservation under federal superintendence and is not and never was Indian country.



**B. The Oneida Indian Nation's federal Indian common law rights are based solely on the Indian Commerce Clause.**

This case would not exist but for the previous ruling in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) that reversed the lower court rulings that the federal courts did not have subject matter jurisdiction to hear the federal common law claims presented by the Oneidas. In that case, this Court concluded that the complaint raised a controversy arising under the Constitution, laws or treaties by asserting a current federal common law right to possession under the Nonintercourse Act of 1790 sufficient to invoke the jurisdiction of the district courts under 28 U.S.C. § 1331 and § 1362. The Oneida complaint to remove the state tax enforcement proceedings to federal court cites the related continuing action of *Oneida Indian Nation v. County of Oneida*, No. 74-CV-187 as the basis in this case "to enjoin illegal tax foreclosure." Opinion A-25

In *Oneida Indian Nation v. County of Oneida*, this Court said "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." There is no citation that follows this sentence. Instead, the Court continues. "It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indian was in the State, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Footnote 6. But this reality did not alter the doctrine that federal law, treaties and statutes

protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida I* at 670.

The opinion then goes to the case of *Worcester v. Georgia*, 31 U.S. 515 (1832) to make the point under the Indian Commerce Clause that "the whole power of regulating the intercourse with them, was vested in the United States. *Id.* at 560." *Oneida I* at 670-1. It continues with some history and then reaches its point. "Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law." *Oneida I* at 675. The Nonintercourse Act, therefore, was interpreted in *Oneida I* as prohibiting tribes under the Indian Commerce Clause to sell or convey its rights to land without the permission of the United States within the 13 original colonies. The Oneida's right of possession has never been deemed more than a federal restriction on alienation of state land under the Indian Commerce Clause. See F. Cohen, Handbook of Federal Indian law (1982 ed.) p. 513-5.

According to this analysis, the Oneida Indians could maintain a suit that Indian occupancy was not properly terminated with federal permission pursuant to the Nonintercourse Act. In upholding the preemptive right of the original 13 colonies over their state lands in *Fletcher v. Peck*, this Court established that the federal courts cannot recharacterize these state reservation lands as federal territorial lands subject to the Property Clause. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-3 (1810). This distinction must be understood to be applied. The lower federal court opinions are confused as to the Oneida's federal right of possession.



As the Respondent's Brief in Opposition makes undeniable clear in their opening statement, the Oneidas are demanding that the federal courts treat the reservation of state land set aside by New York the same as federal territorial public domain lands set aside and reserved to the Mescalero Apache Tribe of New Mexico. "Despite the rule forbidding state and local taxation of Indian reservation land, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), Sherrill levied property taxes on the Oneidas." Br. in Opp. 1. Their whole argument is that the New York reservation was never diminished or disestablished under federal law. As stated in the previous section, unless the United States purchased these lands from the state of New York as done in *United States v. John*, the United States has never had any Property Clause authority over these lands to disestablish, diminish or to convey except to remove the restriction on alienation.

The facts of this case plainly show that following the 1832 decision in *Worcester v. Georgia*, the United States agreed to remove all of the New York Indians from the state of New York as evidenced by the Treaty of Buffalo Creek. As decided in 1898, in a case requiring this Court to interpret the 1838 Treaty of Buffalo Creek, "**These proceedings, by which these tribes divested themselves of their title to lands in New York,** indicate an intention on the part of both of the government and the Indians that they should take immediate possession of the tracts set apart for them in Kansas." *New York Indians v. United States*, 170 U.S. 1, 21 (1898). (emphasis added). The 1838 Treaty Buffalo Creek, executed by the Treaty of May 1842, was the federal permission for the Oneida to convey all of their lands restricted under the Nonintercourse Act to New York.

As confirmed by the Second Circuit opinion in *United States v. Boylan*, in 1842, 1,110 acres remained in the original reservation set aside by New York in 1788. The Treaty of 1842 which executed the broad provisions of the Treaty of Buffalo Creek, gave the permission of the United States required by the Nonintercourse Act as interpreted in *Worcester* to convey all of the Oneida lands. However, 32 acres in Schedule B, although released from the restriction on alienation, was continued as a state reservation for specific families. *United States v. Boylan*, 265 F. 165, 167-8 (2nd Cir. 1920). Only the 32 acres on Schedule B was retained in any federal restricted status.

The position of the United States in *Boylan* was that the families still living on the 32 acres required federal protection as wards to prevent New York from partitioning the remaining reservation land. *Boylan* 256 F. at 477-8. Even the 32 acres was contested as being subject to any federal restriction because the Oneida had ceased to exist as a tribe. See dissent of Circuit Judge Ward, *Boylan* 265 F. at 174-6. The United States never claimed in *Boylan* that lands ceded by the Oneida to New York before the Treaty of Buffalo Creek were not alienated with the permission of the United States or that conveyances of land made before the *Worcester* ruling in 1832 required the permission of the United States to be legally alienated. As Judge Ray said: "In the instant case the restriction on alienation by these Oneida Indians of their lands was not imposed by act of Congress..." *Boylan* 256 F. at 482.

Once Indian lands are alienated with the permission of Congress, even if the Indian tribe reaquires them, the protections of the Nonintercourse Act no longer apply. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06 (1986).



Therefore, under the Indian Commerce Clause, the Oneida Indian Nation, which claims in this case that it has no relation to the Oneidas still living on the reserved 32 acres, does not have a federal claim that these lands in New York are Indian country. Opinion of A3. See footnote 1.

As this Court has already decided, the federal rights of the Oneida Indians to lands within the original reservation set aside by New York are confined solely to the Indian Commerce Clause. Unlike the situation in *Worcester v. Georgia*, the Treaty of Canandaigua does not have language granting the Oneida any federal rights beyond mere occupancy of the state reservation. *United States v. Boylan*, 265 F. 165, 173 (2nd Cir. 1920). This Court should reverse the lower federal courts in this case and hold that there is no federal basis to remove these tax enforcement proceedings from state court.

Under the analysis of *Oneida I*, conveyances of land from the Oneida Indians to the state of New York made prior to the *Worcester* opinion in 1832 were valid unless the principle of *ex post facto* can be suspended or later decisions of this Court applied retroactively to somehow remake these privately purchased parcels into federal territory not subject to state and municipal taxation. As discussed below, federal common law has a history of being applied retroactively, which needs to be reexamined by this Court.

## II. FEDERAL INDIAN COMMON LAW IS NOT IN THE NATIONAL INTEREST

### A. A short history of federal Indian common law.

As the Oneida Nonintercourse Act cases and this case clearly demonstrate, applying old concepts of federal common law using post 1934 legal precedents creates a morass of litigation. In *Ware v. Hylton*, 3 Dall. 199 (1796), this Court for the first time defined the basic sovereign relationships of the new Constitution. The case explains how Indian tribes were treated as semi-foreign states because during our Revolutionary War they had been actively encouraged by Great Britain to wage war against the colonists. According to the *Ware* Court, with the adoption of the Constitution, a single federal Indian policy was developed and applied to all Indian tribes because as long as they existed as tribes they were capable of making war. These preliminary decisions on the balance of the various sovereignties have not changed. See *Sosa v. Alvarez-Machain*, 124 S.Ct 2739 (2004) citing *Ware v. Hylton*.

Prior to 1938, this Court assumed that the federal courts would "discover" federal common law that would create a more just governance. *See generally Swift v. Tyson*, 16 Pet. 1 (1842). This general federal common law included such terms as "tribal sovereignty," "trust," "reservation," and "Indian country" that were interpreted broadly by this Court in the cases regarding statutes and treaties entered by the political branches. In *Worcester v. Georgia*, this Court interpreted an Indian tribe to be a separate sovereign entitled to be treated as wards of the United States owed a duty of protection like a "trust" as a matter of federal common law.



The War Powers under the Constitution of the United States of Solicitor William Whiting, written to justify the war power policies of the Civil War and continue them into the future, explains that from the 1830's forward Indians were regarded as hostiles directly under war power authority. See W. Whiting, War Powers Under the Constitution of the United States, (War Powers), citing speech of John Quincy Adams p. 76-78, (43d ed. 1871). As stated by Mr. Adams: "The war power is limited only by the laws and usages of nations. This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property and of life." War Powers at 77. Federal common law expanded the right to seize and hold conquered territories placing military government over ordinary civil administration in public lands decisions in New Mexico and California. War Powers at 62-63.

During and after the Civil War, the "discovery" of federal common law was replaced with virtual total deference to the Executive and Congress. For the first time, conquered territories became subject to the absolute discretion of the Executive to permit the resumption of self-government and be again clothed with their former political rights. War Powers 309-10. The footnote to this section cites the Northwest Ordinance as being the model of our territorial governments in time of peace. This meant that the temporary territorial status stated in the Property Clause and under the Northwest Ordinance discussed in *Johnson v. M'Intosh*, 8 Wheat. 543 (1823) could be made a permanent status under the war powers. Since the whole conquered South and all federal lands were already subject to the war powers, Solicitor Whiting wrote a memorandum explaining how all lands acquired

by the United States or subjected to federal rights could by various means be deemed federal territory. War Powers at 470-8.

In the case of *Holladay v. Kennard*, 79 U.S. 390 (1871), an actual Indian skirmish during the Civil War is described. The Court casually explains that because there were hostile Indians that were public enemies at war with the United States, that the stagecoach company was required to have an agent of greater faculties than would have been normally required to avoid negligence liability. This case demonstrates how completely the war powers had become integrated into the domestic law. When Congress in the Revised Statute 2079 of March 3, 1871, completely placed federal Indian common law into the main body of statutes that expressly included the war powers from the Civil War, this Court acquiesced. See *United States v. Kagama*, 118 U.S. 375 (1886).

The first two cases in which this Court deferred to the political branches' definitions of Indian law following the Civil War were *In Re Kansas Indians*, 72 U.S. 737 (1866), and *New York Indians v. United States*, 72 U.S. 761 (1866). This Court wrongly interpreted the 1794 Treaty of Canandaigua as if the lands owned by the State of New York were federal territorial lands by applying the decision of the Kansas Indians directly to the New York situation. *Id.* at 769. This error led to the ruling in *New York Indians v. United States*, 170 U.S. 1, 21 (1898) which corrected the earlier misinterpretation by applying the subsequent Treaty of Buffalo Creek.

General federal common law made by the federal courts lay dormant until the 1890's when it resurfaced in an even stronger form than existed prior to the Civil War. This period of judicial activism applied the war



powers incorporated into federal land law while expanding the trust relationship between the Indian tribes and federal government to wholesale challenge state acquired rights to due process of law and to private property. *Talton v. Mayes*, 163 U.S. 376 (1896), *United States v. Winans*, 198 U.S. 371 (1905), *Winters v. United States*, 207 U.S. 564 (1908). Congress responded with the Naturalization Act of 1924 conferring citizenship on all Native Americans. Thus continuing its legislative policy to assimilate the Indian tribes.

With the adoption of the Indian Reorganization Act of 1934, Congress decided the reservations could be deemed permanent. Federal Indian policy had to be publicly perceived as being in the interests of the Indian tribes. For it to be for the benefit of the Indian tribes, the whole history of federal Indian policy was rewritten, camouflaging the war powers and expanding the trust relationship. Solicitor Felix S. Cohen was assigned the task of writing the new Handbook of Federal Indian Law. The Federal Indian Law handbook produced and published by the government is disturbingly similar to the War Powers book produced by Solicitor William Whiting to justify and argue for the continued use of the War Powers during and after the Civil War. Just like the War Powers book, it has gone through many revisions and reprintings. Both books were written by federal solicitors and published originally by the federal government.

Various editions do not necessarily agree with each other. For example, Footnote 5 of *Oneida I* cites not only cases but the U.S. Dept. of Interior, Federal Indian Law handbook of 1958 as setting "out some of the fundamentals of the law dealing with Indian possessory rights to real property stemming from aboriginal title, treaty and statute." *Oneida I* at 669-70.

The 1982 edition of the Handbook of Federal Indian Law says: "The 1958 edition did not reflect Felix Cohen's work....Cohen's balanced synthesis of complex issues evolved into a volume with a constant theme: the federal government's power over Indian affairs is limitless." F. Cohen, Handbook of Federal Indian Law, Preface p. ix (1982 ed.).

**B. The Federal Indian Common Law Rulings in this case are based on War Powers.**

The Oneidas assert on page 16 of their Brief in Opposition that their federal possessory right created by the 1794 Treaty of Canandaigua has always been protected from alienation by the Nonintercourse Act of 1790, 25 U.S.C. § 177. "Thus, in 1795, Secretary of War Timothy Pickering sent to the New York Governor the opinion of Attorney General William Bradford stating that lands held by the Oneidas after the 1788 state treaty were restricted by federal law and that New York could not cause their alienation except 'by a treaty holden under the authority of the United States, and in the same manner prescribed by the laws of Congress.'" Br. in Opp. at 16-7.

Nonintercourse acts are war powers acts. According to William Whiting, the Solicitor of the War Department during and after the Civil War, Congress acknowledged the existence of civil war when it passed the Nonintercourse Act of July 13, 1861 against the seceded Southern States. War Powers at 237-8. He asserts that under the case of the *Hiawatha* the Supreme Court found it was bound to take judicial cognizance of the congressional declaration of war. See *Prize Cases*, 67 U.S. 459 (1863). In *Hiawatha*, Solicitor Whiting asserts that this Court also determined "since



that time the United States have full belligerent rights against all persons residing in the districts declared by the President's Proclamation to be in rebellion." War Powers at 238-9. Full belligerent rights in the United States means that all constitutional rights are nonexistent because a state of war exists. Against the war powers there are no private property rights, civil rights or due process rights under state law. War Powers at 238-40.

It is no accident that when the federal courts assume subject matter jurisdiction to hear a federal Indian common law claim as done in these Oneida cases based on the Nonintercourse Act that all civil rights and state due process is completely subjugated to the federal common law right. No matter how politically incorrect it is to say so, there is an inherent conflict between constitutional civil rights and liberties and reasserting tribal sovereignty claims under federal common law that are federal domestic war powers.[2]

Instead of admitting that the war powers discriminate against Indians, the legal fiction has been perpetuated that the United States was and is protecting Indians as a "trust." This Court has continued to allow Congress to treat Indian tribes as separate from the citizens of the states completely depriving Indian people of any and all constitutional rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49

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[2] Organizations and individuals who promote "the equal protection of the law" including federal and state constitutional rights for all citizens, like CERA and CERF, often endure attacks and negative labeling such as "anti-Indian," "racist," "hate group" and "KKK" precisely because of their advocacy for equal protection. A recent example is a June 22, 2004 article in Indian Country Today entitled "CERA-- The Ku Klux Klan of Indian country" by Dave Lundgren.

(1978). In *United States v. Lara*, 124 S.Ct. 1628 (2004), Congress' authority under the Indian Commerce Clause to treat Indian people as separate from all other citizens was deferred to again allowing an Indian man to be convicted in a foreign tribal court and federal court for the same offense.

But as acknowledged in *Lara*, federal Indian policy has encompassed an aspect of military and foreign policy from our first century. The pages cited to in *Lara* of the decision in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 315-322 (1936) are the rationale that stopped the Executive Branch from using domestic war powers within the United States. *Lara* at 1634. The *Lara* opinion continues by applying this fact to the "plenary" powers assumed to reside in Congress to legislate tribal sovereign authority and federal Indian policy to change "judicially made" federal Indian law. *Id.* at 1637. The *Lara* opinion implies that no previous federal common law decisions are constitutional decisions of this Court protected by Art. III separation of power concerns. Since there is no way to remove the war powers from federal Indian common law, it is no longer in the national interest for this Court to promote federal Indian common law.

## III. THE ONEIDA INDIAN NATION AND THE INDIAN INDIVIDUALS DO NOT HAVE STANDING IN THE FEDERAL COURTS TO CHALLENGE STATE PROPERTY TAXES

### A. The Erie Doctrine should be applied to end federal Indian common law.

In the beginning, if Indian persons ended their tribal affiliations they were treated as all other persons.



Indian tribes that still acted as separate tribes and could wage war were treated as potential enemies subject to exclusive federal control under the Indian Commerce Clause. This simple but realistic approach balanced state and federal interests on lands that had never been federal territory. See *Fletcher v. Peck*, 10 U.S.(6 Cranch) 87 (1810).

According to the United States, the Oneida Indians of the State of New York, who never waged war on the United States, are still separate and apart from the general citizenry of New York requiring this Court to defer to the special trust relationship and enforce their federal common law rights against the people and state of New York. U S. Amicus at 16-17. Their separate status is based on the Executive Branch's exclusive authority to recognize their separate status as an Indian tribe under its war power authority as explained in the prior section of this brief.

This is exactly the kind of discrimination cited in *Erie Railroad Co. v. Tompkins*, 304 U.S. 817 (1938) that required reversal of the general federal common law doctrine of *Swift v. Tyson*. As this Court said: "Diversity of citizenship jurisdiction was conferred to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens... Thus, the doctrine rendered impossible equal protection of the law." *Erie* at 820-1.

The Oneida tribe in their Complaint in this case claim to invoke federal question jurisdiction under 28 U.S.C. § 1331 and the direct statute for Indian diversity jurisdiction, 28 U.S.C. § 1362, as was done in the Nonintercourse case as a matter of federal Indian common law. The Erie Doctrine should apply to Indian diversity jurisdiction under 28 U.S.C. § 1362 just as it

does to 28 U.S.C. § 1332 jurisdiction to stop the application of federal Indian common law by the federal courts. The discriminatory effect of applying Indian diversity jurisdiction with the United States siding with the Oneidas to attack state sovereignty far exceeds the discriminatory effect of a private party asserting federal common law. There are no private property rights, civil rights or state due process rights against these assertions of federal Indian common law.

The Erie Doctrine also applies to federal question jurisdiction under 28 U.S.C. § 1331. The federal common law right of being restored to possession and to territorial sovereignty is the asserted federal question in the Nonintercourse Act cases. In this case this right to possession under federal common law is the basis that the lands can also be made Indian country not subject to municipal property taxes assessed by the City of Sherrill. Under this federal common law analysis, all private property rights can be cancelled and the parcels at issue be deemed federal territory for as long as the Executive Branch designates as explained by Solicitor Whiting. War Powers at 470-8.

There is no limit to this asserted Executive war power as long as the federal courts have federal Indian common law. Congress has never possessed any constitutional authority to change the status of these lands owned by the State of New York except to extinguish any claim that the lands were restricted from alienation. As said in *Erie Railroad Co. v. Tompkins*, "The federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes." *Erie Railroad Co. v. Tompkins*, 304 U.S. 817, 819 (1938).



The decision in the *Village of Venetie* was an attempt to rebalance state and federal interests by confining the federal common law definition of Indian country to the statutory definition of Indian country. The lower federal courts utterly disregarded the decision as discussed in the first section of this brief in favor of a broad federal common law definition of their own fashioning. If the federal courts can hear these federal Indian common law claims there will always be the potential for a federal judge to apply the war powers to completely destroy state jurisdiction even over land that was never federal territory. Such a power could destroy the tax base not only of the City of Sherrill but also of the State of New York and other states.

The only solution to end the use of federal war powers in federal Indian common law is to apply the Erie Doctrine that "There is no federal general common law." *Erie* at 822. Such a declaration would not terminate all Indian tribal rights. The Indian tribes that reside on historic Indian reservations of federal public domain land will still retain most of the statutory rights they presently enjoy. What is terminated is the ability of the federal courts to restore or place additional lands under federal territorial status subject to the war powers. This does mean that the Indian Commerce Clause, Treaty Clause and Property Clause must be reinterpreted to remove federal Indian common law on a case by case basis. [3]

The 32 acres of land still reserved by the State of New York for tribal use will remain untaxed. Lands

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[3] This same argument would apply against placing lands into "trust status" a federal Indian common law term incorporated into 25 U.S.C. § 465.

purchased by the Oneida Indians within the original set aside by the State of New York would no longer be capable of being deemed Indian country by a federal court as a matter of federal Indian common law to evade municipal taxation.

**B. The Fourteenth Amendment cannot be applied in Indian claims to remove lands from state taxation.**

The Complaint in this case also cites 42 U.S.C. § 1983 as a basis for asserting the subject matter jurisdiction of the federal courts to remove these parcels of property from the jurisdiction of the City of Sherrill. Under *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003) the Oneida Indian Tribe is not a "person" entitled to bring suit against the City of Sherrill. *Inyo County* at 704, 708-12. The Complaint was also filed by individual tribal members against the City of Sherrill. Whether individual tribal members can assert federal Indian common law claims based on the Nonintercourse Act, 28 U.S.C. § 177, as a civil rights action has not been answered by this Court.

Obviously, 42 U.S.C. § 1983 is a civil rights statute. The Oneida individuals are asserting that the City of Sherrill violates their civil rights by taxing these parcels of land, which they claim were not federally permitted to be conveyed to New York under the federal Nonintercourse Act. The individuals asserting the civil rights claim are citizens of the State of New York. These individuals are arguing that it violates their civil rights to treat the disputed parcels as being under state municipal jurisdiction because of federal Indian common law.



The civil rights statute, 42 U.S.C. § 1983, is based on the Fourteenth Amendment to the United States Constitution. Indians not taxed are not "persons" entitled to raise a civil rights claim. The Fourteenth Amendment in Section 2 excludes Indians not taxed. Therefore, the only way these individual Indians can assert a claim as persons is if the land they reside on is taxable. These individual Indians have no standing under 42 U.S.C. § 1983 to assert that any federal court has authority to declare that these parcels of land are not subject to taxation by the City of Sherrill. Only under federal Indian common law do these members of the Oneida Indian Nation have standing to bring this suit against the City of Sherrill that their right of self-government is harmed by the land being taxed.

As stated in *Erie Railroad Co. v. Tompkins*, it is a violation of the equal protection of the law, the main provision of the Fourteenth Amendment, to allow federal common law to cause discrimination. This Court has recently upheld the application of *Erie Railroad Co. v. Tompkins*, in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) to limit the discretion of the federal courts to create or formulate new federal common law principles to 18th Century statutes like the Alien Tort Statute of the Judiciary Act of 1789. This Court specifically held that "These reasons argue for great caution in adapting the law of nations to private rights."

This reasoning should apply equally to the Nonintercourse Act of 1790. In 1790, the Indian tribes were treated as foreign states only obligated by treaty and the law of nations. See *Ware v. Hylton*, 3 Dall. 199 (1796). The lower federal courts in this case wrongly expanded the federal Indian common law term of Indian country by applying modern federal Indian

common law precedents to alter the historical meaning of the Nonintercourse Act of 1790 under *Sosa v. Alvarez-Machain*. These parcels of land which were within the state lands reserved for the Oneida Indians in 1788 are not and never have been Indian country.

## CONCLUSION

The lower federal court rulings should be reversed and this case dismissed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner*,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, AND IVA ROGERS,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICI CURIAE* TOWN OF LENOX, NEW YORK; TOWN OF STOCKBRIDGE, NEW YORK; AND TOWN OF SOUTHAMPTON, NEW YORK IN SUPPORT OF PETITIONER CITY OF SHERRILL, NEW YORK

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## QUESTIONS PRESENTED

*Amici* will address the following three questions, all of which are fairly subsumed under the third question presented for review in the City of Sherrill's petition for a writ of *certiorari*:

1. Whether this Court's decisions in *Oneida I* and *Oneida II* resolved the issues of present-day title and sovereignty within the Oneida's 18th-century New York reservation.

2. Whether the Oneida's 18th-century New York reservation was either disestablished or, at the very least, substantially diminished as the lawful and intended result of the Treaty of Buffalo Creek of January 15, 1838, 7 Stat. 550.

3. Whether, in the eight generations following the 1838 Treaty of Buffalo Creek, the Oneida have lost their remaining title and sovereignty over most if not all of their original 18th-century reservation, regardless of whether such losses were contemporaneously authorized under federal law.

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## INTEREST OF THE *AMICI CURIAE*[1]

"When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem v. Bartlett*, 465 U.S. 463, 471 n.12 (1984). The first two *amici* are towns within the area encompassed by the historic boundaries of the Oneida's 18th-century reservation – boundaries that have been treated as having been extinguished since at least the Jacksonian era.[2] These *amici* and other area local governments have struggled in recent years to carry out their responsibilities in the face of unilateral attempts by the Oneida Indian Nation of New York to withdraw increasing amounts of purchased land from state and local taxation, zoning, and other regulatory oversight – all on the premise that the 18th-century reservation boundaries have never been diminished to *any* extent and that the entire area is now and always has been "Indian country." The other *amicus* is a town located outside the boundaries of the Oneida land claim area, but which is keenly interested in the rules of present-day sovereignty and jurisdiction that apply in areas subject to ancient tribal claims.[3]

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[1] This *amici* brief is presented pursuant to this Court's Rule 37.4; the towns' authorized law officers appear as co-counsel. Pursuant to this Court's Rule 37.6, counsel of record for the *amici* represents that he authored this brief and that no entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The towns do intend in the future, however, to seek contributions from other towns in the Oneida land claim area to offset some of the expenses incurred in preparing and submitting this brief.

[2] The Town of Lenox, located in Madison County, was founded in 1809 and had a population of 8,665 as of the 2000 census. The Town of Stockbridge, also located in Madison County, was founded in 1836 and had a population of 2,080 as of the 2000 census.

[3] The Town of Southampton, located in Suffolk County on Long Island, was founded in 1640 and had a population of 54,712 as of the

The Oneida's unilateral attempts to withdraw lands from the local tax base have had a serious impact on the *amici's* budgets and services in recent years.[4] In addition, as this Court has recognized, creating "Indian country" sovereignty in "scattered checkerboard fashion over a territory otherwise under state jurisdiction" will "obviously" result in "many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory." *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 429 n.3 (1975). This is particularly so where, as here, the layout of the checkerboard is left entirely to the discretion of the Nation; sovereignty, jurisdiction, and regulatory authority over any given parcel of land supposedly change hands simply through an open-market transaction. This has resulted in the Nation being able to cherry pick whatever lands it wishes – including gas stations, convenience stores, shopping centers, marinas, and other key commercial properties – and then unilaterally purporting to declare their immunity from state and local taxation and regulation. It is difficult if not impossible for local governments to carry out their home rule powers and statutory mandates in the midst of the ensuing chaos and uncertainty.

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2000 census. The Town's borders include lands held by the Shinnecock Indian Nation, which is not a federally recognized tribe. *See New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

[4] Although the Oneida Indian Nation makes "goodwill" grants to affected local governments, these are entirely voluntary, may be withheld at any time at the Nation's sole discretion, and in any event are insufficient to make up for the true lost tax revenues. For example, earlier this year the Nation withheld its annual $120,000 grant to the Stockbridge Valley Central School District because the District declined to fire an employee that the Nation wished to have terminated; the District took the position that a fund donor may not influence personnel matters in this manner. The District is now in fiscal chaos.



## SUMMARY OF THE ARGUMENT

As Senior Judge McCurn emphasized in his pathmarking opinion on claims against private landowners in the Oneida land claim area, "the real task at hand" is to determine "how, in the 21st century, to reconcile the Indians' interest in their homelands with those of current landowners who, understandably, also view the claim area as their 'homeland.'" *Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61, 93 (N.D.N.Y. 2000). It has been eight generations since the United States and the Oneida entered into the Treaty of Buffalo Creek of January 15, 1838, 7 Stat. 550. To treat the Oneida's *entire* 18th-century reservation as having escaped the effects of the 1838 removal treaty and as still being "Indian country" today is to pretend that the events of the last two centuries did not occur. It ignores the purpose and effect of Indian removal – the official law of the land for much of the 19th century. It ignores the language and clear Congressional purposes behind the 1838 treaty. It ignores the facts that about 85% of the Oneida people *did* leave New York during the removal era, that only about 5% of the Oneida people live there today, and that the current population of the area embraced by the old reservation boundaries is over 99% non-Oneida.[5] And it

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[5] There were 600 Oneida in Wisconsin and 620 in New York at the time of the 1838 treaty, the Wisconsin Oneida having removed from New York beginning in the early 1820s. *See* Schedule A to the treaty, 7 Stat. at 556. The number of Oneida remaining in New York dwindled to 178 by the early 1840s. *See* Jack Campisi, *The Oneida Treaty Period, 1783-1838, in The Oneida Indian Experience: Two Perspectives* 61 (J. Campisi & L. Hauptman eds., 1988). The numbers are even more lopsided today; less than 5% of the Oneida people live in New York. *See* Barry M. Pritzker, *A Native American Encyclopedia: History, Culture, and Peoples* 443 (2000) (as of the early 1990s there were 11,000 Oneida in Wisconsin, 4,600 in Ontario, and about 700 in New York). On the origin, execution, and legacies of the Oneida removal, see generally *The Oneida Indian Journey: From New York to Wisconsin, 1784-1860* (L. Hauptman & L. McLester eds., 1999).

ignores the last 166 years of "jurisdictional history," in which the federal government has *consistently* until recent years recognized state and local sovereignty over the lands in issue, with the exception of the dwindling number of tribal allotments that remained in trust.[6]

Indian nations, no less than other sovereigns, are subject to the rule that "[l]ong acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary." *Massachusetts v. New York*, 271 U.S. 65, 95 (1926). Pretending that reservation boundaries that were drawn in the 1780s are *still* in effect today without any adjustment – unfair and tragic though the intervening centuries have been in so many respects – would be like pretending that England never lost the colonies, that the Dutch never lost New York to the English, or that France and Spain have rights today on the North American continent.

Respecting long-established patterns of sovereignty, jurisdiction, and regulatory authority does not leave the Oneida without a means of either recovering for any treaty violations they are able to demonstrate in the ongoing land claim litigation or establishing sovereignty over recently purchased lands. As Senior Judge McCurn held on remand from this Court's decision in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) ["*Oneida II*"], the Oneida are entitled to recover historically adjusted monetary damages for any treaty violations they are able to establish (subject to various pending defenses and counterclaims that are presently being litigated).[7] The

[6] The land base of the Oneidas who elected not to remove dwindled to less than a thousand acres by the early 1840s, to 350 acres by the 1890s, and to 32 acres by the early 20th century. *See* Campisi, *supra* note 5, at 61.

[7] *See* 199 F.R.D. at 90-95. Now that the United States has intervened in the land claim litigation and sued the State of New York, *see id.* at 68-69, there is a proper forum to adjudicate the degree of the federal government's culpability for the events in issue, and to establish (through counterclaims for setoff and recoupment) the amount of the relative financial responsibility of the United States for the Oneida's losses, which can then be presented to Congress.



Oneida may use any monetary recovery to purchase additional lands, and may seek to make some or all of those lands exempt from state and local taxation by following the trust acquisition procedures spelled out in 25 U.S.C. § 465 and its implementing regulations, which ensure a judicially reviewable decision by the Secretary of the Interior that gives careful consideration to the concerns of all affected stakeholders, including "[j]urisdictional problems," "potential conflicts of land use," "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(e)-(g).

There is no reason why the § 465 trust acquisition mechanism could not be included as part of any final resolution of the underlying land claim (whether through settlement or a judicial decree). The Oneida have offered no explanation why it would be futile or impracticable to use this available remedial mechanism. Particularly in light of the eight generations of delay since the 1838 treaty and the reliance interests of the many other stakeholders in the land claim area, there is no good reason to recognize the Oneida's unilateral attempts to exercise self-help remedies in the midst of ongoing litigation in which the underlying merits have yet to be resolved. If the Oneida's sovereign landbase is to be rebuilt, it must be pursuant to the intergovernmental planning mechanisms created under 25 U.S.C. § 465, not through unilateral declarations of sovereignty over checkerboard acquisitions that are cherry-picked off the open market.

## ARGUMENT

### I. The Issues Of Present-Day Indian Title And Sovereignty Were Not Resolved In *Oneida I* And *Oneida II*.

The Oneida and the federal government will argue that the issues of current Indian title and sovereignty throughout the original reservation have already been resolved – either expressly or by necessary implication – in *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974) ["*Oneida I*"], and *Oneida II*. That argument misses the mark in at least two fundamental respects.

#### A. Most Of The Land Claim Area Involves Acquisitions That Have Not Yet Been Addressed By The Courts, And That Were Approved Both Expressly And Implicitly By The Federal Government During The Removal Era.

The original 18th-century Oneida reservation was acquired by the State and private parties through a series of some thirty transactions that extended through *eleven* Presidencies – from the second Washington Administration (1795) through the Polk Administration (1846).[8] This Court's opinions in *Oneida I* and *Oneida II* involved only the first of these transactions, in which the Washington Administration objected to New York's acquisition in 1795 of part of the reservation from the Oneida. *See* 470 U.S. at 232-33. The Oneida and the federal government would have this Court conclude that the resolution in *Oneida I* and *Oneida II* with respect to a "test case" involving fewer than 900 acres of the 1795 acquisition – a case decided on a

[8] The transactions are summarized in Findings of Fact (FOF) ¶¶ 6-28 in *Oneida Nation of New York v. United States*, 26 Ind. Cl. Comm. 138, 150-62 (1971), *aff'd in part and remanded in part*, 477 F.2d 939 (Ct. Cl. 1973).



limited set of affirmative defenses – dictates the outcome as to all other acquisitions that followed over the next 51 years and somehow forecloses other affirmative defenses that have never been addressed.

But as this Court observed just last Term, "the Government's Indian policies ... fluctuate[d] dramatically as the needs of the Nation and those of the tribes changed over time," often with "tragic consequences." *United States v. Lara*, 124 S. Ct. 1628, 1634 (2004). This case demonstrates the point. As the Indian Claims Commission found 26 years ago after an exhaustive analysis, the Washington Administration's objection in 1795 "was the last time that the Federal Government would make even a pretense of interfer[ing] with New York State's attempts to negotiate treaties for land cessions with any of the New York Indians, and certainly with the Oneida Indians." *Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 385 (1978); *see id.* at 395. Instead, beginning in the early 1800s and extending into the 1970s, it was the position of the Executive Branch that the Indian Trade and Intercourse Act was "not applicable to cases ... in which the State of New York [was] purchasing or condemning land from its own resident Indians." 26 Ind. Cl. Comm. at 146 (quoting U.S. position).[9] As the ICC summarized the historical record,

[9] *See also* July 1, 1968 Letter from Assistant Secretary of the Interior Harry R. Anderson to Jacob Thompson, *reprinted in* George C. Shattuck, *The Oneida Land Claims: A Legal History* 115-16 (1991) (reiterating long-standing position of the Department of Justice and Department of the Interior that the Trade and Intercourse Act did *not* apply "to the dealings of the State of New York with its Indians"); *Tuscarora Nation of Indians v. Power Auth.*, 257 F.2d 885, 889 (CA2 1958) ("[A] large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians.") *vacated as moot*, 362 U.S. 608 (1960).

New York's ongoing acquisition of Oneida reservation lands during the removal era was undertaken with the full knowledge and enthusiastic approval of the federal government:

> "Far from an on-going struggle for suprem[a]cy between the Federal Government and the State of New York as to the jurisdiction over New York's Indians ..., responsible official[s] of the Federal Government actually expressed the opinion that New York had the paramount rights to control the affairs of the Indians within its borders. ... [The historical] record indicates that the Federal Government was fully aware of New York's negotiations with the New York Indians at all times. The record also indicates that the United States had no desire to take any action to prevent New York from doing what would otherwise have been the Government's job, i.e., buying lands from the New York Indians in order to persuade them to move west. The Federal Government's removal policy applied not just to New York State, but to the entire Atlantic seaboard. In New York State the state was carrying out [that] policy with very little Government help and that evidently was much to the liking of the Federal Government. ... *In carrying out its general removal policy the Government required cessions to itself of lands in Georgia from the Indians in that state, but it had no need to do so in New York State, because New York was doing it for them*." 43 Ind. Cl. Comm. at 405-06 (emphasis added, paragraph breaks omitted).[10]

[10] In at least two instances (1798 and 1802), the United States expressly approved the acquisitions. *See, e.g.*, 470 U.S. at 246-47 & nn. 19-20; 43 Ind. Cl. Comm. at 387. Thereafter, the approval was implicit; responsible federal officials participated in the events surrounding the acquisitions, were kept advised of developments, and facilitated the Oneida's removal, without ever objecting to New York's negotiation or execution of the land acquisitions. As the ICC summarized, with the exception of a single 1819 memorandum, "[n]o more was heard of the Indian Trade and Intercourse Act in the correspondence, memorials and other official documents relative to the sale of New York Indian lands to the State of New York and the removal of the Indians to the west[.]" 43 Ind. Cl. Comm. at 395; *see also id.* at 392-95; *id.* at 423-39 (FOF ¶¶ 47-49), 441-44 (FOF ¶ 51), and 446-63 (FOF ¶¶ 54-56).



As the ICC further held after examining the pertinent records, the 1838 Treaty of Buffalo Creek was negotiated on the basis of this shared understanding – that the Oneida should deal directly with New York, without federal supervision, in disposing of their remaining lands:

> "It is apparent that the negotiators for the Federal Government ... felt that political jurisdiction over the tribes and the real fee in the land belonged to the State of New York and was not in the Federal Government. With respect to the Oneida Indians who were partly in Madison County and partly in Oneida County, one of the Treaty Commissioners, Federal Indian Agent Gillet, advised the Commissioner of Indian Affairs that the fee title to the land was in the State of New York and therefore the Oneidas would have to make a treaty with the Governor of New York State relinquishing their interest in those lands." *Id.* at 403-04; *see also id.* at 460-61 (FOF ¶ 56).

The United States has previously conceded, and the ICC has specifically held, that the 1838 treaty authorized New York to acquire the Oneida's remaining reservation lands in direct transactions with the dwindling remnants of the tribe. *See id.* at 385, 406-07, 466.

This history is important in two critical respects. *First*, it belies the Oneida's claim that the entire 18th-century reservation was illegally conveyed between 1795 and 1846. The judicial determinations that have thus far been made concerning a single transaction that occurred during the Washington Administration do not establish the illegality of

later conveyances during the Jefferson, Madison, Monroe, Adams, Jackson, Van Buren, Harrison, Tyler, or Polk Administrations – especially where the State of New York was simply carrying out a cooperative policy with the active blessing of many of those Administrations pursuant to a shared understanding of the governing law. *Second*, this history must be given substantial weight in determining the extent of appropriate rights and remedies in the 21st century for allegedly illegal acquisitions of tribal lands that occurred during the 18th and 19th centuries. As this Court has emphasized, federal acquiescence in a State's assumption of jurisdiction not only is relevant in construing the underlying treaty or statute in issue, but "has created justifiable expectations" that deserve independent respect and protection. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 (1977); *see* Part III *infra*.

### B. *Oneida I* And *Oneida II* Held Only That There Was A Justiciable Cause Of Action For Ancient Wrongdoing, And Did Not Resolve Issues Of Present-Day Rights And Remedies.

Both the majority and the dissent in *Oneida II* remarked upon "the extraordinary passage of time" in the land claim litigation. 470 U.S. at 256 (Stevens, J., dissenting); *see also id.* at 253 ("One would have thought that claims dating back for more than a century and a half would have been barred long ago."). The majority, however, held that the Oneida had a justiciable cause of action for the 1795 conveyance and also rejected certain affirmative defenses that the counties had raised (while holding open other potential defenses). *See id.* at 233-50.[11] The majority did *not* hold that the Oneida have

[11] For example, the majority expressly reserved judgment on the equitable defense of laches, *see* 470 U.S. at 244-45, as well as other "equitable" limitations on any final relief, *id.* at 253 n.27. In addition, although the majority rejected the argument that subsequent federal



continuing title and sovereignty over the disputed lands, and it expressly reserved all questions of remedy in any future proceedings "should Congress not exercise its authority to resolve these far-reaching Indian claims." *Id.* at 253 n.27.

Regrettably, Congress has not in the two decades since *Oneida II* come close to resolving these long-standing claims. Instead, after years of inaction, the federal government in 1998 joined the three Oneida tribes in seeking to add claims for trespass, ejectment, and monetary damages against a defendant class of 20,000 landowners in the land claim area. This litigation tactic was a shocking departure from long-standing assurances by both the federal government and the Oneida, and was rejected in a significant opinion by Senior Judge McCurn in September 2000. Note in particular Judge McCurn's blistering analysis of the federal government's "extremely detrimental" role in this litigation in the years since *Oneida II*.[12] With respect to the scope of this Court's prior decisions, Judge McCurn emphasized that "there is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right – a distinction which in the court's opinion must be drawn, especially given that the alleged wrong in this case occurred more than 200 years ago." 199 F.R.D. at 90 (emphasis in original); *see id.* at 66.

treaties in 1798 and 1802 had retroactively "ratified" the 1795 conveyance, *id.* at 246-48, no defenses were litigated involving the *prospective* effects of the 1838 Treaty of Buffalo Creek and the removal of over 85% of the Oneida from New York between 1820 and 1845. The United States recognized in *Oneida II* that numerous "additional considerations not raised by petitioners might bar recovery or limit relief in other cases" – including the 1838 treaty. Brief for United States As *Amicus Curiae* in Nos. 83-1065 and 83-1240, at 28; *see id.* at 28-40.

[12] 199 F.R.D. at 87; *see also id.* at 68-69 (criticizing the federal government's "inexplicable delay" in the land claim litigation and its "head-in-the-sand attitude"); *id.* at 71 n.9 (*re* "cavalier attitude" by federal government that "has pervaded this litigation and settlement efforts"); *id.* at 85-87.

Judge McCurn held that the Oneida could recover historically adjusted monetary damages for their dispossession, but could not seek to eject or recover damages from present landowners. *See id.* at 87-95. He relied heavily on this Court's "impossibility" cases in holding that the Oneida may not seek ejectment as a remedy for ancient wrongs:

> "These practical concerns as to the impossibility of restoring Indians to lands formerly occupied by them resonate deeply with this court. Such concerns are magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries – significantly longer than in [other cases in which the Supreme Court found the requested relief to be time-barred]. ... [T]he time has come to transcend the theoretical. The present motions cry out for a pragmatic approach." *Id.* at 92.

As set forth below, *amici* believe this same kind of pragmatic, equitable approach is required in resolving the Oneida's present claims to continuing sovereignty over lands from which they removed early in our Nation's history. Put another way, although the time-based concerns discussed by the dissent in *Oneida II* may not have been sufficient to extinguish the entire tribal cause of action, it is perfectly appropriate to give them substantial weight in deciding whether and to what extent the Oneida still have rights in the disputed lands and, if so, how those rights are best vindicated in the least disruptive manner with the greatest respect for the rights of *all* affected stakeholders. The Second Circuit in this case dismissed the relevance of the "impossibility" doctrine, restricting it to issues of possession and title, not sovereignty. *See* 337 F.3d 139, 156-58 (CA2 2003). This gives far too little weight to the importance of sovereignty over land; if anything, long-standing patterns of sovereignty, jurisdiction, and regulatory authority should be subject to *greater* certainty and repose than matters of title and use rights in land. *See* Part III *infra*.



## II. The Original 18th-Century Oneida Reservation Was Either Disestablished Or, At The Very Least, Substantially Diminished Pursuant To The 1838 Treaty Of Buffalo Creek.

*Amici* fully agree with the City of Sherrill and other *amici* that the Oneida reservation in New York was either entirely disestablished or, at the very least, substantially diminished as the lawful and intended result of the 1838 Treaty of Buffalo Creek. This treaty was the New York manifestation of the federal government's "removal" policy – "the dominant feature of U.S. Indian policy" in the years between the War of 1812 and the Mexican War.[13] The removal policy was unfair to the tribes and was premised on unacceptable notions about the impossibility of Indians and non-Indians living together, but the changes wrought by the treaties and statutes from that era must be recognized and given effect unless and until overturned by Congress and the President. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) (although the "guiding philosophy" of

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[13] Robert M. Utley, *The Indian Frontier of the American West, 1846-1890*, at 37 (1984) ("Throughout the 1830s and 1840s the eastern Indians were uprooted and moved westward. Some fifty thousand people made the trek, many at great cost in suffering, hardship, and impoverishment. They yielded 100 million acres of eastern homeland in return for 32 million western acres and 68 million dollars in annuity pledges."). For additional works discussing the origins and execution of the federal removal policy, see, *e.g.*, Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* 189-207 (1981); Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 179-314 (1984); Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 156-207 (1994); Michael P. Rogin, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* (1975); Ronald N. Satz, *American Indian Policy in the Jacksonian Era* (1975); Anthony F.C. Wallace, *Jefferson and the Indians: The Tragic Fate of the First Americans* (1999); Philip Weeks, *Farewell, My Nation: The American Indian and the United States, 1820-1890*, at 1-71 (1990).

the allotment era has been "repudiated," "we must give effect" to laws from that time).[14]

Without repeating arguments in other briefs, *amici* call the Court's attention to several broader flaws in the Oneida's 1838 treaty analysis:[15]

(a) The Oneida argued below, and the Second Circuit accepted, that a reservation may not be found to have been disestablished or diminished unless the treaty or other law included particular real estate language of immediate cession or restoration. *See* 337 F.3d at 161, 163. This argument relies entirely on cases involving allotment-era land conveyances, where the federal government had an interest (the right of preemption) to which precise language of real estate cession was relevant, and seeks to read the context of those cases back onto Indian claims within the 13 original States, where the federal government did not hold the right of preemption and therefore real estate language of cession in a treaty would be irrelevant. If anything, the language used in the 1838 treaty communicates much more powerfully than any title language a disestablishment of tribal sovereignty in Central New York State. If relatively dry real estate

[14] *See also United States v. Choctaw Nation*, 179 U.S. 494, 532-38, 541 (1900); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 463 (CA7 1998) (Harlington Wood, J., concurring) (courts cannot "renegotiate or rewrite the treaty or history, nor can we erase other relevant factors from the slate in order to satisfy this present generation") (*re* effect of Midwestern removal treaties), *cert. denied*, 526 U.S. 1066 (1999).

[15] The Oneida argued below that the 1838 treaty is void and unenforceable. But the President, the Senate, and this Court have always treated Buffalo Creek as a valid treaty, and the Oneida themselves collected money from the United States on the premise that the treaty *is* binding and enforceable. *See generally United States v. New York Indians*, 173 U.S. 464, 469-70 (1899); *New York Indians v. United States*, 170 U.S. 1, 5 n.1 (1898) (*re* ratification and proclamation of 1838 treaty); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857); Prucha, *American Indian Treaties*, *supra* note 13, at 203-07.



language during the allotment era was "precisely suited" to terminating Indian sovereignty, *DeCoteau*, 420 U.S. at 445, so much more the case for treaty language in which a tribe agreed to "remove" to the western "Indian Territory" and to establish its new "home," "government," and "laws" out there. Arts. 2, 4, & 13, 7 Stat. at 551-52, 554.

Moreover, even the cases involving allotment-era conveyances have emphasized that there is no "clear statement" rule regarding termination of tribal sovereignty; "we have never required any particular form of words before finding diminishment." *Hagen v. Utah*, 510 U.S. 399, 411 (1994). The issue, instead, is whether there is a federal intent with respect to the affected lands that is "*inconsistent with the continuation of reservation status*." *Id.* at 414 (emphasis added). As this Court said more recently in *Yankton*, 522 U.S. at 345-46, the issue is whether the disputed language can be "reconciled" with the continued existence of the original reservation boundaries, or whether there is a "glaring inconsistency" between the new law and the old reservation.[16]

Here there is a "glaring inconsistency" – an "irreconcilable conflict" – between the Treaty of Canandaigua of November 11, 1794, 7 Stat. 44, and the 1838 Treaty of Buffalo Creek. The earlier treaty had "acknowledge[d]" the Oneida's large state-created reservation. Art. 2, 7 Stat. at 45. The 1838 treaty, on the other hand, said that the Oneida's "permanent" reservation

[16] *See also Rosebud*, 430 U.S. at 587 & n.4 (issue is whether there is a "congressionally manifested intent" that "reservation status" not survive; there are no "absolutes" in determining whether federal action resulted in a disestablishment of tribal jurisdiction); *DeCoteau*, 420 U.S. at 446 (Court looks for language indicating that the lands have been "stripped of reservation status"); *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420 (CA10) ("Cession language ... need not be the only language clearly signaling the cancellation of reservation boundaries."), *cert. denied*, 498 U.S. 1012 (1990).

would be out west, that they had to establish their own form of "government" and own "laws" out there, and they had to leave New York *"as soon as"* – not "if" – they could make "satisfactory arrangements." Arts. 2, 4 & 13, 7 Stat. at 551-52, 554 (emphasis added). Even giving a generous construction to the August 9, 1838 "solemn[] assur[ance]" by Agent Ransom H. Gillet, the Oneida agreed in 1838 that they either had to leave the eastern United States or that they would remain on *"their lands where they reside"* and could "if they choose to do so remain *where they are* forever." Joint Appendix [JA] 146 (emphasis added). These agreements necessarily operated to release and extinguish any claims of tribal sovereignty over New York lands on which the Oneida did *not* reside as of 1838. The contrary construction is simply unimaginable given the context and tenor of the times. To conclude that the sweeping terms of the 1838 removal treaty could somehow be read as a reaffirmation of the reservation boundaries drawn fifty years earlier in the 1788 state treaty – a result that would lead to the very jurisdictional and cultural conflict and chaos that the removal policies were intended to eliminate – is to disregard Congress's core purposes. "[A]s Mr. Justice Holmes ... commented, we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud*, 430 U.S. at 597 (quoting *Johnson v. United States*, 163 F. 30, 32 (CA1 1908)).[17]

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[17] *See also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians ... does not permit reliance on ambiguities that do not exist."); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' ... clearly runs counter to a tribe's later claims"); *DeCoteau*, 420 U.S. at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent."); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180 (1947) ("we cannot, under the guise of interpretation, ... rewrite congressional acts so as to make them mean something they obviously were not intended to mean"); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) (in construing a treaty, "[w]e stop short of varying its terms to meet alleged injustices").



(b) The Second Circuit took, in essence, an "all-or-nothing" approach to the 18th-century reservation boundaries: Because the Oneida were not physically compelled to remove from their home area, and because small remnants of the Oneida remained in New York on much-reduced holdings, the Second Circuit declined to find that the original reservation boundaries had shrunk *at all*. *See* 337 F.3d at 161-64. This reasoning ignores that the Oneida *did* agree to "remove" west, that the vast majority *did* leave New York during the removal era, that they *did* sell most of their remaining holdings pursuant to Article 13 of the 1838 treaty, that the remaining Oneida did *not* seek to occupy or control any part of their original reservation *other than* the small land holdings they retained, and that *over 99%* of the people living within the supposed "reservation" are non-Oneida. *See supra* note 5. This Court has repeatedly held that, even where a reservation may not have been entirely disestablished, it was at the very least substantially diminished as a result of the federal laws under scrutiny. *See, e.g., Yankton, supra*; *Hagen, supra*; *Rosebud, supra*. However one characterizes the August 9, 1838 agreement between Agent Gillet and the Oneida, it clearly went no further than the "lands where they reside[d]" and "where they [were]" as of that time. Under any reasonable construction of the treaty, particularly in its historical context, the original reservation was at least diminished to that extent.[18]

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[18] The Second Circuit erred in its reliance on *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), in which this Court invalidated attempts by New York State to impose taxes on Seneca lands in 1840 through 1843. Article 10 of the 1838 Treaty of Buffalo Creek had given the Seneca a five-year grace period to remain in New York following the treaty's ratification, which postponed the removal obligation until 1845

(c) The Oneida argued below that, since most of the original reservation had already been conveyed away by the time of the 1838 treaty, the treaty could only have had an effect on those several thousand acres still in the Oneida's possession at that time. Even putting to one side that this argument fails to explain why the reservation was not diminished at least to the extent of the lands sold *pursuant* to the 1838 treaty,[19] the argument fails on several levels. The Oneida promised to remove to a new "home" in the "Indian territory," where they could practice their own "government" and "laws," and to leave New York State "as soon as they can make satisfactory arrangements." (Arts. 2, 4, & 13, 7 Stat. at 551-52, 554.) These provisions on their face have a much broader sweep than the 5,000 acres then being held by the Oneida in New York. The expressed purpose of the 1838 treaty was to remove the Oneida from the entire State of New York. It would be irrational in light of that purpose to give the treaty such a narrow construction and application.

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(the treaty not having been proclaimed until 1840); the removal obligation was thereafter rescinded completely with respect to two of the Seneca reservations that were the targets of the state tax. This Court held that because "[t]he time for the surrender of the possession, according to [the Senecas'] consent given in the [1838] treaty, had not expired when these taxes were levied" in the early 1840s, "[t]he taxation of the lands was premature and illegal." *Id.* at 770. This case involves the very different issue of continued claims of tribal sovereignty long *after* any transitional periods had passed and *after* nearly all of the lands had been sold away and all but a few of the Oneida had removed from New York State, as promised in the treaty. Similarly, *United States v. Boylan* involved only the 32-acre parcel that was occupied by a remnant of the original tribe after the removal policy had been carried out; there is not a hint in that decision of any kind of retained tribal sovereignty over the entire original reservation. *See* 265 F. 165, 171-74 (CA2 1920), *error dismissed*, 257 U.S. 614 (1921).

[19] As noted above, the ICC has previously determined, and the federal government has previously conceded, that Article 13 constituted a federal "authorization" for the State to deal directly with the Oneida in acquiring the remainder of the reservation. *See supra* at 9.



This Court has specifically held that a federal law can extinguish reservation status not only over lands actually conveyed in that law, but over lands previously disposed of and to be disposed of in the future. In *DeCoteau*, for example, much of the Lake Traverse Reservation was allotted immediately following the Dawes Allotment Act, ch. 119, 24 Stat. 388 (1887), and the remainder was ceded back to the federal government through an 1891 act. This Court held that the entire reservation was terminated by the 1891 act, *including* the lands that had previously been allotted. 420 U.S. at 446-47. That is no different than what happened here.[20]

## III. Whether Or Not The Conveyances Of Oneida Land And Sovereignty Were Contemporaneously Authorized Under Federal Law, They Were Confirmed Through Decades Of Federal Policy And Inaction. Any Reversion Of Sovereignty Must Now Be Undertaken Pursuant To The Remedial Provisions Of 25 U.S.C. § 465.

This Court has emphasized "the special need for certainty and predictability" when dealing with long-standing reliance-based expectations regarding title, boundaries, and use rights.[21] This "special need" is served through the

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[20] *See also Pittsburgh & Midway*, 909 F.2d at 1420-21 ("[t]he restoration of unallotted lands ... cancelled reservation boundaries" over previously allotted as well as restored lands); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1028 (CA8 1999) (Congress in an 1894 cession act "intended to diminish the reservation by not only the ceded land, but also by the [previously allotted] land which it foresaw would pass into the hands of the white settlers and homesteaders" in the future once the trust restrictions had expired).

[21] *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. ... This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations ...."); *see*

overlapping doctrines of acquiescence, abandonment, extinguishment, impossibility, release, and relinquishment, as well as through long-established principles regarding "takings" of recognized Indian title by the United States. The Oneida and the federal government may seek to limit these doctrines to matters involving title and possession of land, as opposed to sovereignty over that land. That distinction is unconvincing for several reasons. *First*, the Second Circuit linked its sovereignty analysis to the continued, unbroken existence of the Oneida's "Indian title" in the disputed lands, reasoning that a given parcel of land reacquires sovereign immunity from state and local taxation when "fee title" is reunited with "Indian title." *See* 337 F.3d at 157-58. The doctrines discussed below, however, all demonstrate that Indian title has not survived the past two centuries, but has been extinguished and taken. There are no continuing rights in taken lands.

*Second*, Congress did not separate the concepts of Indian title and sovereignty until 1948, the year it enacted the definition of "Indian country" in 18 U.S.C. § 1151. Before then, the extinguishment of Indian title to a given parcel would have been understood as "also diminishing the Reservation's jurisdictional boundaries" to that extent. *Thompson v. County of Franklin*, 987 F. Supp. 111, 124 (N.D.N.Y. 1997); *see also Yankton Sioux Tribe v. Gaffey*, 188 F.3d at 1022.

*Third*, stable rules of sovereignty, jurisdiction, and regulatory authority are, if anything, even more important than stable property and use rights. This Court's cases recognize that the "justifiable expectations of the people living in the area" extend not only to matters of title and use,

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*also Arizona v. California*, 460 U.S. 605, 620 (1983) ("Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open."); cases cited in notes 24-26 *infra*.



but to issues of self-government, community planning and control, effective law enforcement, and the minimization of unwieldy "checkerboard" jurisdiction. *Hagen*, 510 U.S. at 421.[22] If there should be a reconstruction of "Indian country" in Central New York State, it must be undertaken pursuant to the intergovernmental planning mechanisms promoted by § 465, not through unilateral cherry-picking and checkerboard acquisitions of prime real estate on the open market.

### A. The Federal Government's Long-Standing Recognition Of State And Local Sovereignty Over Nearly All Of The Original Reservation Area Supports A Determination Of Disestablishment Or Diminishment.

This Court has noted that, on a "pragmatic level," it is sometimes necessary to "acknowledge[] that *de facto*, if not *de jure*, diminishment may have occurred" at some points in our history. *Solem*, 465 U.S. at 471; *see also Yankton*, 522 U.S. at 356. Although demographic evidence alone provides "the least compelling" justification for a finding of diminishment, *Yankton*, 522 U.S. at 356, such a finding is warranted where demographic evidence is coupled with a long-standing recognition by the federal government – the tribes' guardian – of the primacy of state and local

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[22] *See especially Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (opinion of Stevens, J.) ("Zoning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually – or more often unilaterally – destructive."); *id.* at 458 (opinion of Blackmun, J.) (emphasizing that the "ability to engage in the systematic and coordinated utilization of land" is "the very essence of zoning authority," and that zoning "'may indeed be *the most essential function performed by local government*'") (emphasis added, citation omitted).

jurisdiction, sovereignty, and regulatory authority over the lands now in dispute. *Rosebud* is closely on point. There, an arguably ambiguous 1904 law was treated by federal and state officials as having diminished reservation jurisdiction. Writing 73 years later, in 1977, this Court concluded that

> "the single most salient fact [in the jurisdictional history] is the unquestioned actual assumption of state jurisdiction over the [challenged area]. Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the 'jurisdictional history.' The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, *not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.*" 430 U.S. at 603-05 (emphasis added, citations omitted).

*See also Yankton*, 522 U.S. at 357 (emphasizing "[t]he State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day"); *DeCoteau*, 420 U.S. at 442 ("state jurisdiction over the ceded (*i.e.*, unallotted) lands went virtually unquestioned [from the 1890s] until the 1960s").

The cited cases involved periods of federal acquiescence of less than a century. Here the federal government took the position for over a century and a half that New York had properly acquired the lands from the Oneida and had lawful sovereignty and jurisdiction over all but a handful of the Oneida's original lands. This extraordinary period of



acquiescence is relevant not only because of the light it sheds on the 1838 treaty's intended meaning, but because it has created "justifiable expectations" that must be honored and protected when seeking to remedy whatever historic wrongs were committed against the Oneida.

### B. The Federal Government Participated In The Taking Of Both The Oneida's Lands And Their Sovereignty With Respect To Nearly All Of The Original Reservation. There Is No Continuing Tribal Sovereignty Over Taken Lands.

The case for disestablishment or diminishment of the Oneida's sovereignty is reinforced by decisions finding federal "takings" of reservation lands after a long period of federal acquiescence in the illegal loss of those lands. To be sure, it is well-settled that illegal dispositions of tribal lands could be cancelled even after many years when the lands were still being held by the original purchasers.[23] This Court's cases establish, however, that where tribal lands were sold in violation of federal law, the conveyances were allowed to stand for several generations, and the lands were settled and developed in reliance on this federal acquiescence, the lands were "taken" from the tribes. *United States v. Creek Nation*, 295 U.S. 103 (1935), is illustrative. Lands belonging to the Creek were allotted to another Indian tribe and conveyed to settlers in violation of numerous federal laws, "and the grantees have since been holding the

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[23] *See, e.g., Heckman v. United States*, 224 U.S. 413 (1912) (allotted trust lands that were illegally conveyed between 1904 and 1908 could be recovered from the grantees in an action commenced within several years of conveyances); *Boylan*, 265 F. 165 (declaring that 1905 mortgage foreclosure of tribal land and forced removal of Oneida Indians had been illegal in ejectment action brought by United States several years later); *see also United States v. Southern Pac. Transp. Co.*, 543 F.2d 676 (CA9 1976) (railway right-of-way declared illegal in action brought 90 years after it had first been obtained).

same adversely to the Creek tribe." *Id.* at 107. This Court acknowledged that

> "the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden .... Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. *On the contrary, it permitted the disposals to stand – not improbably because of the unhappy situation in which the other course would leave the allottees and settlers.* In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.
>
> *"We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe."* *Id.* at 110-11 (emphasis added).

And once tribal lands had been thus "taken" by the United States, while there continues to be a sovereign obligation to pay damages there are no continuing tribal rights in the land. In *Confederated Salish & Kootenai Tribes v. United States*, for example, treaty-guaranteed reservation lands had been illegally conveyed to settlers, granted to railroads, and turned into national forests. 401 F.2d 785, 786 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969). Notwithstanding the tribes' protests, the federal government had allowed these actions to stand for over 60 years and had "uniformly" treated the lands as no longer belonging to the tribes. Rather than seek monetary relief, the tribes argued that the lands were still theirs and sought possession and an accounting of profits. *See id.* Invoking *Creek Nation*, the court rejected this theory: the government's actions had



> "effected a taking of the plaintiffs' land. The Government would not be allowed to escape paying compensation for the property .... *By the same token, the Indians cannot now claim that the lands have always remained theirs.*" *Id.* at 789 (emphasis added).

These takings cases are applications of what has sometimes been called the "impossibility" or "impracticability" doctrine – the principle that, where Indian lands have been conveyed in violation of federal law, the conveyances have been allowed to stand for a long time, and the lands have passed into the hands of "innumerable innocent purchasers," the "restor[ation of] the Indians to their former rights" in the lands will be deemed a judicially "impossible" remedy. *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926). In *Felix v. Patrick*, 145 U.S. 317 (1892), for example, lands that properly belonged to an Indian claimant were conveyed in violation of federal law. Over the course of the next thirty years, the lands became part of the City of Omaha and were "now intersected by streets, subdivided into blocks and lots," and filled with "buildings of a permanent character." *Id.* at 334. As this Court bluntly concluded in rejecting the beneficial owners' claims to the lands, "it needs no argument to show that the consequences of setting [the conveyances] aside would be disastrous ... and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation." *Id.* at 335. Although *amici* acknowledge that these cases are distinguishable on various grounds, similar concerns apply here. Because Indian title was taken through the course of many generations of federal policies and acquiescence, the Oneida "cannot claim that the lands have always remained

theirs." *Confederated Salish & Kootenai Tribes*, 401 F.2d at 789.[24]

### C. Most Of The Oneida People Abandoned And Relinquished Any Interests In The New York Reservation, Which Resulted At The Very Least In A Proportionate Diminishment Of The Reservation.

This Court has emphasized that there is "no reason" why the doctrine of "acquiescence" should not apply to disputes involving tribal lands, and has analogized to this doctrine in examining issues of reservation diminishment.[25] Whether

[24] *See also Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983) ("[i]f in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties" who have acquired water rights in reliance on earlier decrees); *id.* at 145 (Brennan, J., concurring) (citizens have the right to "rely on specific promises made to their forebears two and three generations ago" by federal officials, but the injured tribe may seek a takings remedy); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 409 n.26 (1980); *United States v. Minnesota*, 270 U.S. 181, 215 (1926) (where reservation lands had been illegally acquired by the State half a century or more earlier, "the United States is entitled to a decree canceling the patents for such as have not been sold by the State and charging her with the value of such as she has sold" – a recognition that illegally acquired lands that were long ago sold into private ownership are no longer subject to Indian title); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1467 (CA10 1987) (injustices against tribes "would have to be recompensed through monetary awards" rather than through quiet title or ejectment actions).

[25] *See United States v. Stone*, 69 U.S. (2 Wall.) 525, 537 (1865) (*re* tribal acquiescence in boundary of Delaware Indian Reservation for "more than thirty years"); *see also Rosebud*, 430 U.S. at 605 & n.28. *See generally Oneida II*, 470 U.S. at 257 n.5 (Stevens, J., dissenting); *Massachusetts v. New York*, 271 U.S. at 95-96. This Court has found in recent Terms that periods of sovereign acquiescence that ran for 43 and 64 years were insufficient under the particular facts of those cases to establish the defense. *See Virginia v. Maryland*, 124 S. Ct. 598, 610-11 (2003) (relevant alleged prescriptive period was 1957-2000); *New Jersey v. New York*, 523 U.S. 767, 786-90 (1998) (alleged prescriptive period ran from 1890-1954). Here the prescriptive period ran from no later than the Van Buren Administration until the Clinton Administration.



analyzed under the rubric of "acquiescence" or related principles of "abandonment," "extinguishment," "release," or "relinquishment," the removal by most of the original Oneida Nation away from New York many generations ago, coupled with the long-standing acquiescence of the remaining tribal members and their federal guardians in the exercise of state and local sovereignty over nearly all of the original reservation, should be held to have resulted in the disestablishment of tribal sovereignty and jurisdiction over all lands not retained by the Oneida.

*Williams v. Chicago*, 242 U.S. 434 (1917), is illustrative. The Potawatomi held rights in what is now northeastern Illinois pursuant to the Treaty of Greenville of August 3, 1795, 7 Stat. 49, a treaty that guaranteed tribal occupancy rights in similar language to that used in the 1794 Treaty of Canandaigua (*compare* Art. 2 of the 1794 treaty *with* Art. 5 of the 1795 treaty). The Potawatomi sold the area to the United States in 1833; most of the tribe thereafter removed west of the Mississippi River, but the small "Pokagon Band" remained in the Midwest. The Pokagon brought suit in the early 20th century seeking to recover possession of lands that, they claimed, had never been included within the earlier conveyance. They contended that "[i]t is not enough that the complainants' ancestors had removed from the vicinity of the lands in question," and that "[t]heir removal without sale does not affect their title." 61 L. Ed. 414, 416 (argument of counsel).

This Court unanimously rejected the "removal without sale" argument. The right recognized in the 1795 Treaty of Greenville had been one of occupancy alone, not "fee-simple title." 242 U.S. at 437.

> "If in any view [the Potawatomi Nation] ever held possession of the property here in question, *we know*

> *historically that this was abandoned long ago*, and that for more than a half century it has not even pretended to occupy [the claimed area]. ... We think it entirely clear that [the 1795 treaty] did not convey a fee-simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned, *all legal right or interest which both tribe and its members had in the territory came to an end*." *Id.* at 437-38 (emphasis added).

The 1794 Treaty of Canandaigua did nothing more than "acknowledge" a state-created right of tribal "use and enjoyment" and promise to respect that right "until [the Oneida] choose to sell the [lands] to the people of the United States, who have the right to purchase." Art. 2, 7 Stat. at 45. Even if this created a *federal* occupancy right, *Williams* demonstrates that such a right did not continue after a tribe had ceased to occupy the actual area in dispute. Just like the Pokagon Band in *Williams*, the Oneida "long ago" moved off all but a handful of the lands and "ha[ve] not even pretended to occupy" those lands in the generations since. This constituted an "abandonment" of rights in all lands on which they no longer lived.[26]

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[26] *See also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 357-58 (1941) ("acquiescence" by tribe in an arrangement in which members moved to a reduced reservation in exchange for not being removed from the area altogether "must be deemed to have been a relinquishment of tribal rights" in all other lands that were "notoriously claimed by others"; "it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved"); *Buttz v. Northern Pac. R.R. Co.*, 119 U.S. 55, 69-70 (1886) (treaty-recognized title to certain Sioux land in Dakota Territory had been extinguished in part through the creation and acceptance of an 1867 reservation: "The Indians had then retired to the reservations set apart for them by the treaty of 1867, thus giving up the occupancy of the other lands. The relinquishment thus made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned[.]"); *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (CA10) (when Osage "chose to go elsewhere," this constituted "a surrender and abandonment" of treaty-recognized title in their former reservation), *cert. denied*, 287 U.S. 656 (1932).



This line of cases – whether labeled "acquiescence," "abandonment," or something else – has two important consequences here. *First*, during the removal era, the Oneida fragmented into various factions, most of which accepted lands elsewhere in North America and removed entirely from New York. The Oneida who actually removed from New York clearly relinquished their New York claims under the cases discussed above, and the size of any remaining reservation must accordingly be diminished to reflect these removals.[27]

*Second,* these principles apply as well to the remnants of the Oneida community that chose to remain in New York. The Oneida's agreement with the federal government in 1838 was to remove west "as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida" – language that, they were told, would allow them to remain "where they *reside*" and "where they *are* forever," if "satisfactory arrangements" could not be made. *See* JA 146 (emphasis added). Even giving this language its most generous reasonable construction, the deal struck through the treaty negotiations was that the Oneida could remain "where they *are*" and "where they *reside*" (*i.e.*, on the 5,000 acres they still possessed in 1838), not that they could *reassert* rights in the

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[27] This proportionate reduction is not only fair and equitable on its own terms, but accords with American history. Under the 1887 Dawes Allotment Act and similar legislation of that era, reservations were "allotted" into separate parcels to be held individually, with a cap on acreage per individual, and with "surplus" lands then sold off. There is no reason to believe that the remnants of the Oneida that remained in New York would have escaped this per capita approach had they somehow managed to hang on to their original reservation lands until the late 19th century.

295,000 acres they had given up in recent generations. The Oneida who stayed in New York never thereafter sought to exercise possession or sovereignty over lands their forebears had previously conveyed. They thereby lost any remaining rights they may have held in these lands through acquiescence, abandonment, and relinquishment every bit as much as the Oneida who moved away from New York.

## CONCLUSION

This Court should reverse the judgment below and hold that the Oneida's 18th-century reservation has been disestablished or, at the very least, substantially diminished. Any rebuilding of a sovereign Oneida landbase in Central New York State should be carried out pursuant to 25 U.S.C. § 465.

Respectfully submitted,

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No. 03-855

IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner*,

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents*.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## *AMICI CURIAE* BRIEF OF THE COUNTIES OF MADISON AND ONEIDA, NEW YORK, IN SUPPORT OF PETITIONER


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The Counties of Madison and Oneida, New York ("Counties"), submit this amicus brief on the merits in support of Petitioner, City of Sherrill, New York. The Counties fully support the arguments advanced by Petitioner but would like to bring to this Court's attention additional matters relating to the questions presented.

## STATEMENT OF INTEREST

The Sherrill parcels owned by the Respondent Oneida Indian Nation of New York ("the Oneidas") are within Oneida County. Other parcels claimed by the Oneidas to be Indian country are within both Counties.[1] The Counties were the defendants in *Oneida I* and *Oneida II*, and the original defendants in the main land claim filed by the Oneidas in the United States District Court for the Northern District of New York.

## INTRODUCTION

The lower courts' errors in this and other pending cases share a common root: a misunderstanding of what this Court decided (and did not decide) in *Oneida I* and *Oneida II*. In *Oneida I*, this Court held that the Oneidas' complaint asserted a claim for possession under federal law. *Oneida I*, 414 U.S. 661, 677-78 (1974). In *Oneida II*, this Court held that the Counties violated the Oneidas' federal common-law right of possession to 872 acres which the State had acquired as part of the Treaty of 1795, that the common-law was not preempted by the 1793 Indian Trade and Intercourse Act, and that the Counties' affirmative defenses (statute of limitations, abatement, ratification by the Treaties of 1798 and 1802, and nonjusticiability) did not apply. *Oneida II*, 470 U.S. 226, 233-50 (1985).

This Court recognized the "potential consequences" of *Oneida II* and took pains to limit its decision:

> The question whether equitable considerations should limit the relief available to the present day

1. A map showing approximately 17,000 acres purchased during the last decade in a checkerboard fashion by the Oneidas in the Counties is appended hereto. Citations in this brief to "A__" refer to the Appendix to the Counties' *Amicus* Brief in Support of the Petition. Citations in this brief to "SCJA __" refer to the Joint Appendix filed in the Second Circuit.

> Oneida Indians was not addressed by the Court of Appeals or presented to this Court by petitioners. Accordingly, we express no opinion as to whether other considerations may be relevant to the final disposition of this case should Congress not exercise its authority to resolve these far-reaching Indian claims.

*Oneida II*, 470 U.S. 226, 253 (1985). Other questions were also not resolved, including: whether the Oneidas retained aboriginal title to the approximately 300,000 acres reserved to them by New York State in the 1788 Treaty of Fort Schuyler,[2] whether the 1794 Treaty of Canandaigua created a federal reservation for the Oneidas, whether the 1838 Treaty of Buffalo Creek disestablished any (supposed) federal reservation, or whether the 1802 Indian Trade and Intercourse Act applies to the parcels at issue here. The Counties discuss these questions, which were incorrectly decided below, in this brief.

## SUMMARY OF THE ARGUMENT

Sherrill's enforcement of its real property tax assessments depends on whether the parcels are, today, within Indian country - notwithstanding the passage of almost two centuries of settlement, cultivation and use pursuant to treaties, willingly made, between New York State and the Oneidas beginning in 1785.[3] In answering this question, the Second Circuit erred by

2. In the trial leading to *Oneida II*, the Counties presented no evidence. *See Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527, 532 (N.D.N.Y .1977). The trial court found that, as a consequence of the 1788 Treaty with New York State, the Oneidas' "were left with a reservation of about 300,000 acres." *Id.* at 533. The court and parties appear to have assumed that this "reservation" of land preserved the aboriginal Indian title, as opposed to replacing it with property rights created by state law. *Id.* at 538. This Court's statement that the Oneidas' "were left with a reservation of about 300,000 acres," *Oneida II*, 470 U.S. at 231, reflects the trial court's finding. Accordingly, the question of whether the 1788 Treaty extinguished all the Oneidas' aboriginal title and retroceded to the Oneidas a state-law-based reservation was not presented or addressed by the Court in *Oneida II*.

3. The federal government approved of New York's purchases and took no action to prevent them. *See Oneida Nation of New York v. United States*, 43 I.C.C. 373, 405 (1978).



(I) using the wrong legal standard to interpret two critical treaties (the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua), (II) misreading the scope and applicability of the Indian Trade and Intercourse Act of 1802, (III) improperly discounting historical evidence in interpreting the 1838 Treaty of Buffalo Creek), (IV) all in violation of the Tenth Amendment of the Constitution of the United States.

I.A. In the 1788 Treaty of Fort Schuyler, the Oneidas ceded "all their lands to the people of the State of New York forever," thus extinguishing aboriginal title. In return, New York retroceded to the Oneidas a state reservation arising under and defined by New York law. The New York high court and this Court long ago endorsed this construction of the 1788 Treaty with New York. The Second Circuit's contrary interpretation that the Oneidas never ceded the entirety of their ancient domain is erroneous.

I.B. The 1794 Treaty of Canandaigua, to which New York State was not a party, did not divest New York of its property and create a federal reservation for the Oneidas. Instead, it merely "acknowledged" the existence of the reservation created by New York in the 1788 Treaty. The Senecas (not the Oneidas) were the real party-in-interest to the 1794 Treaty, and the federal commissioner who described by metes and bounds the Senecas' reservation in the 1794 Treaty confessed that the "United States had no right to the lands" he purported to relinquish to the Senecas, or, by implication, to the Oneidas' reservation which he merely acknowledged.

II. The Indian Trade and Intercourse Act ("ITIA") does not apply to the parcels at issue. ITIA was principally concerned with the frontier regions and the act applied to Indian country only. The Oneidas' reservation was not Indian country since aboriginal title had been extinguished in 1788 and it lay east of the boundary line contained in the 1796 and later versions of ITIA.

III. The jurisdictional history following the 1838 Treaty of Buffalo Creek clearly shows that Indians and non-Indians alike treated the Oneidas' reservation as having been disestablished. Consistent with their justifiable expectations,

non-Indian settlers flooded the area, built houses, created businesses, formed governments and raised their families, and now compose 99.75% of the Counties' population. Most of the Oneida Indians left the region, and the few that remained were assimilated into the overwhelmingly non-Indian population. By the end of the 19th century the Oneidas were "known no more" as a tribe in New York.

IV. The decision below needlessly infringes on the sovereignty of state and local governments. New York has exercised unchallenged control over the area for more than 200 years. The Oneidas do not have the right to oust long-established state and local governments simply by purchasing parcels of land in open market transactions.

## ARGUMENT

### I. The Court of Appeals Used the Wrong Legal Standard to Interpret the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua

According to the Second Circuit, "[t]here is no material dispute that the Sherrill Properties were part of the Oneidas' aboriginal land and the tribe's reservation as recognized by the Treaty of Canandaigua." 337 F.3d at 153. In fact, both these matters - the aboriginal status of the land, which was extinguished by the 1788 Treaty of Fort Schuyler, and the effect of the 1794 Treaty of Canandaigua - are contested. The Second Circuit erred by ignoring these issues and improperly construing the applicable treaties generously in favor of the Oneida Indian Nation of New York.

Although the principle of generous construction is often appropriate when analyzing Indian treaties, it may not be used to divest a state of its land. *United States v. Minnesota*, 270 U.S. 181, 209 (1926); *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1163-64 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); *Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 530 (W.D.N.Y. 2002). This court held in *Minnesota* that a treaty cannot be construed to divest a state's rights in land "unless the purpose to do so be shown in the treaty with such certainty as to put it beyond reasonable question." 270 U.S. at 209. By wrongly applying the doctrine



of generous construction, the Second Circuit misinterpreted critical treaties to divest New York State of its property interest in and jurisdiction over the land in question, and by extension a much larger area in central New York.[4] The Second Circuit also ignored contrary interpretations by this Court and renowned legal scholars that were rendered much closer in time to the treaties in question.

#### A. The 1788 Treaty of Fort Schuyler Between New York and the Oneidas

The 1788 Treaty of Fort Schuyler ("1788 Treaty"), first, effected a transfer of all of the Oneidas' land to New York, thereby extinguishing forever aboriginal title, and second, created a state reservation. (A10-A14). However, in a single sentence in a footnote, the Second Circuit below dismissed this argument. 337 F.3d at 156 n.13. Instead, it interpreted the 1788 Treaty generously in the Oneidas' favor as "carv[ing]-out" 300,000 acres that "never became state land" and in which aboriginal title survived. *Id.*[5] In so holding, the Second Circuit disregarded the rule of construction mandated by *Minnesota*,

4. The long-standing sovereignty of state and local governments over not only the ancient Oneida Reservation but also other areas claimed by different Indian tribes has been thrown into question by *Sherrill*, and not just as to tax matters. Citing *Sherrill*, the same district court recently enjoined local governments from enforcing zoning and land use regulations on properties that the Cayuga Indians purchased in open market transactions in Cayuga county. *See Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (2004).

5. The district court opinion cited as authority by the Second Circuit likewise misapplied the principle of generous construction. *See Oneida Indian Nation of New York v. State of New York*, 194 F. Supp. 2d 104, 139 (N.D.N.Y. 2002). The district court reached its decision, in part, on the authority of this Court's statement in *Oneida II* that "the Oneidas retained a reservation of about 300,000 acres" under the 1788 Treaty of Fort Schuyler. *Id.* (quoting *Oneida II*, 470 U.S. at 231). This Court's statement, in turn, reflected a finding by the trial court that the Oneidas "were left with a reservation of about 300,000 acres" as a consequence of the 1788 Treaty of Fort Schuyler. *Oneida Indian Nation of New York State v. County of Oneida*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977). The trial court (and the parties) in *Oneida II* appear to have assumed that this "reservation" of land to the Oneidas preserved the Oneidas' aboriginal title, as opposed to extinguishing the Oneidas' original Indian title and granting them a state-law-based property right. *Id.* at 538.

and its conclusion is inconsistent with the language of the treaty, New York law, and the considered understanding of early judicial authorities.

In its "First" article, the 1788 Treaty states: "The Oneidas do cede and grant ***all their lands*** to the people of the State of New York ***forever***." (emphasis added). In the "Second" article, New York set apart for the Oneidas a tract from "the said ceded lands" that was "reserved for . . . several uses," including a portion the Oneidas could use and cultivate (but not sell, lease, or alienate in any way), and the balance of which could be leased to others, subject to certain restrictions. The effect of the plain treaty language was to convey all the Oneidas' land to New York and thereby extinguish aboriginal title. New York, as the sovereign vested with the right of preemption,[6] acquired absolute fee title to "***all*** [the Oneidas'] lands" when the treaty was made. *See, e.g., Mitchel v. United States*, 34 U.S. 711, 746 (1835) (Indians may abandon, cede or sell their right to possess and occupy their lands, rendering their right extinct and disencumbering the land); *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823) ("All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."). The text does not support the Second Circuit's generous interpretation that the Oneidas retained aboriginal title in the land "reserved" for their use. Rather, the 1788 Treaty unambiguously extinguished the Oneidas' aboriginal rights to their entire ancient domain in the first article, while granting them in the next article a state reservation created and defined by New York law.

Early authorities confirm this interpretation. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent),[7] described the treaty as follows:

6. During the confederal period, New York was the sovereign vested with the right of preemption over that area now claimed by the Oneidas. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *Johnson v. M'Intosh*, 21 U.S. 543, 584 (1823).

7. Chancellor Kent (with the likes of Chief Justices Jay and Marshall) is commonly regarded as a founding father of American jurisprudence. (Cont'd)



> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ***ceding the whole*** of their vast territory to the people of this State, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding twenty-one years.

*Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (emphasis supplied). Because the 1788 Treaty was a ***New York State*** treaty – and its construction is a question of ***state*** law – the lower courts should have deferred to Goodell's construction of the treaty. *Cf., Central Hanover Bank & Trust Co. v. Kelly*, 319 U.S. 94, 97 (1943) ("The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us").

Eight years later, Chief Justice Marshall, apparently mindful of *Goodell*, noted that "some tribes" made pre-Constitution treaties with New York State "by which they ***ceded all their lands*** to that state, ***taking back*** a limited grant to themselves, in which they admit their dependence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (emphasis added). Although Chief Justice Marshall does not specifically identify the Oneidas, he almost certainly had the 1788 Treaty of Fort Schuyler in mind (as well as similar treaties with the Onondaga and Cayuga tribes) as the language of the treaty matches his description in Cherokee Nation.

Finally, identical language in a 1789 treaty between New York and the Cayuga Indians was construed in accordance with *Cherokee Nation* and *Goodell* by a panel of arbiters that included Roscoe Pound, Dean of Harvard Law School. At issue was a claim by Great Britain, on behalf of the Cayuga Indians in Canada, against the United States for annuities. *See* 20 Am. J. Int'l Law 574-594 (1926). The panel found that the Cayugas' aboriginal title to the land had been extinguished, and the

(Cont'd)
Oliver Wendell Holmes, Jr., in his 1873 Preface to the twelfth edition of *Kent's Commentaries on American Law*, noted that "[t]he great weight attaching to any opinion of Chancellor Kent has been deemed a sufficient reason for not attempting any alteration in his text or notes."

lands ceded to New York. *Id.* at 590. Citing *Cherokee Nation*, the panel wrote, "[w]e think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession." *Id.*

In short, the plain language of the treaty, as interpreted by early authorities, compels the conclusion that the Oneidas ceded "all their lands" to New York – including the parcels at issue in this case – thereby extinguishing their aboriginal title, and accepted a limited grant from New York. The Second Circuit erred by construing the 1788 Treaty of Fort Schuyler as preserving aboriginal title in the retroceded portion of the Oneidas' lands.

### B. The 1794 Treaty of Canandaigua Between the United States and the Six Nations

Proceeding from the invalid assumption that the Oneida Indian Nation retained aboriginal title to a portion of their ancestral lands, the Second Circuit compounded its error by failing to interpret the 1794 Treaty of Canandaigua, 7 Stat. 44 (1794), in accordance with *Minnesota* and concluded that it divested the State of its property and created a federal reservation. 337 F.3d at 156.[8] The provisions of the 1794 Treaty, read in historical context, show that no federal reservation was created for the Oneidas. Indeed, the Second Circuit's interpretation of the treaty renders it an illegal, uncompensated taking of state property in violation of the Fifth Amendment. *See, e.g., Seneca Nation of Indians*, 206 F. Supp. 2d at 533-34.

In Article II of the 1794 Treaty, the United States merely "***acknowledge[d]*** the lands reserved to the Oneida, Onondaga and Cayuga Nations, ***in their respective treaties with the state of New York***, and called their reservations, to be their property; . . . ." (emphasis added). In addition, the United States asserted that *it* would "never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Nothing in the quoted language, or any other article, shows

8. Significantly, the State of New York was not a party to the 1794 Treaty of Canandaigua.



that the treaty's purpose was to divest New York of its interest in the land "with such certainty as to put it beyond reasonable question." *Minnesota*, 270 U.S. at 209; *Oneida Indian Nation*, 860 F.2d at 1163-64.

This interpretation is consistent with the view expressed by U.S. Attorney General William Wirt less than 25 years later that the Treaty of Canandaigua had no effect on the rights of New York *vis-à-vis* the Oneidas:

> [T]he legal titles of the States of New York and Massachusetts, and of the grantees under them . . . ***are not divested, or in any manner impaired*** by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the pre-existing rights of the Indians in any manner enlarged by that treaty.

Op. Att'y Gen. William Wirt (March 26, 1819) (emphasis supplied) (A23-A28).

The absence of any purpose or intent to create a federal reservation for the Oneidas is confirmed by the treaty's context. History reveals that the Seneca Nation was the primary reason for – and intended beneficiary of – the 1794 Treaty, not the other tribes of the Six Nations, including the Oneidas. *See Seneca Nation of Indians*, 206 F. Supp. 2d at 487. In 1782, New York agreed to cede to the United States its claim to western lands (present-day Ohio and the Erie Triangle). *See id.* at 473. Later, pursuant to the 1784 Treaty of Fort Stanwix, the United States obtained from the Six Nations a release of their claims to these western lands, and in 1792 patented to Pennsylvania that portion lying west of New York known as the Erie Triangle, in which, among the Six Nations, only the Seneca tribe had an interest. *Id.* at 478-80, 483; William N. Fenton, *The Great Law and the Longhouse* at 646 (1998) (A29-A35).

The 1784 Treaty of Fort Stanwix, however, proved over the next decade to be the source of much discontent among the Senecas. *Id.* at 480-86. By 1794, Pennsylvania was threatening to force the Senecas out of the Erie Triangle, *see* Fenton, *supra*, at 646-50, and rumors circulated that the Senecas (and possibly other Iroquois tribes) might join the

active warfare between the western Indians and the United States. *Id.* at 486. The United States therefore renewed treaty negotiations at Canandaigua. *Seneca Nation of Indians*, 206 F. Supp. 2d at 486-87.

The primary purposes of the 1794 Treaty of Canandaigua were to obtain an express renunciation of rights in the Erie Triangle and reconfirm peace and friendship between the United States and the Six Nations, in particular the Senecas. *Id.* at 490 (*quoting* Letter from Timothy Pickering to Secretary of War Henry Knox of November 12, 1794). Prominently absent from the historical record is any indication of a federal purpose to take New York property and establish "recognized title" in the Oneidas (or other Iroquois nations).

To mollify the Senecas, Pickering (the federal commissioner to the 1794 Treaty) resorted to trickery by purporting to relinquish rights he knew the United States did not possess. In his letter transmitting the 1794 Treaty to Secretary Knox, Pickering baldly stated "[y]et not a foot of land has been given up which by the cession then made the U. States had a right to hold: all that I have relinquished falling within the pre-emption right of Massachusetts, and lying within the State of New York." *Id.* In a subsequent letter to Secretary Knox, Pickering confessed "that the United States had no right to the lands which I relinquished" in the 1794 Treaty, and stated, "I felt myself embarrassed . . . by presenting an idea of something very valuable, while, in fact the subject of the relinquishment was a shadow." *Id.* at 492 (*quoting* Letter from Pickering to Secretary Knox of December 26, 1794). He also recognized that the land in question lay "within the jurisdiction of New York," and that "no purchase or sale of lands made of or with the Indians within the limits of that State, could be binding . . . unless made . . . with the consent of the legislature of that State." *Id.* at 491-92. Although Pickering was speaking of the Senecas, the real-party-in-interest to the 1794 Treaty, *id. at* 487, his understanding certainly applied equally to the Oneidas' state reservation, which lay hundreds of miles east of the Seneca's territory, in the center of New York.



By way of contrast, the Congress in the August 3, 1795 Treaty of Greenville with the Wyandots and other Indians, 7 Stat. 49, demonstrated clearly that it knew how to protect aboriginal title where the United States – and not New York – held the underlying fee and right of preemption to a reservation which it described by metes and bounds. This treaty, which was also executed under then Secretary of War Pickering's supervision, unambiguously restricted the Indian tribes' right to sell to only the United States:

> [W]hen those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold ***only to the United States;*** and until such sale, ***the United States will protect all the said Indian tribes*** in the quiet enjoyment of their land ***against all citizens of the United States,*** and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States ***and no other power whatever.***

*Id.* (emphasis added). This striking difference in language between two treaties negotiated less than a year apart and approved by the same person (Pickering) further confirms the well-known fact that the United States had no right, title or interest in the Oneida's state reservation land, and therefore had nothing to "set aside" for the Oneidas.

In fact, the Oneidas themselves have previously taken the position that the 1794 Treaty of Canandaigua applied only to lands ceded by New York in 1782 to the United States and not to lands within the state. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1096-97 (2d Cir. 1982) ("The Oneidas . . . contend . . . that in any event the Treaty of Canandaigua, which was the last in a series aimed at obtaining Indian cession of Ohio Valley lands to the United States, applies only to the territory that had been in dispute, namely Ohio territorial lands outside the boundaries of the states, not Oneida land in New York."). Similarly, the United States argued before the Indian Claims Commission that the Treaty

of Canandaigua did not divest New York of its rights or enlarge the rights of the Indians. (A36-A49).

By failing to apply the *Minnesota* rule of treaty construction and disregarding the historical context, the Second Circuit erred in construing the 1794 Treaty of Canandaigua to effect an illegal, uncompensated taking of New York's property for the benefit of a nominal party-in-interest that, in the past, has disclaimed that interpretation. The federal reservation that the Second Circuit saw in the 1794 Treaty of Canandaigua was illusory – or in the words of Pickering, "a shadow."

## II. The Indian Trade and Intercourse Act Does Not Apply To The Properties At Issue

The Second Circuit further erred by concluding that the Indian Trade and Intercourse Act of 1802, 2 Stat. 139, applied to the properties at issue (transferred by the Oneidas in 1805) and operated to preserve the Oneidas' allegedly "unextinguished" Indian title. 337 F.3d at 146-47, 157-58. As explained above, Indian title in the parcels at issue was extinguished in 1788, when the Oneidas ceded and granted all their lands to New York and took back a limited property interest. Subsequent conveyances by the Oneidas of their state reservation to the State, or with the State's approval, are not prohibited by the Indian Trade and Intercourse Act of 1802, or other iterations of the enactment ("ITIA"), because they lie outside its intended reach. *See Bates v. Clark*, 95 U.S. 204, 208 (1877) ("The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer."); *American Fur Co. v. United States*, 27 U.S. 358, 369 (1829).[9]

As a preliminary matter, the Second Circuit's decision improperly disregards the explicit geographic boundary line added to the 1796 version (and later versions) of the ITIA that delineated Indian country from territory of the United States. *See* Act of May 19, 1796, ch. 30, § 1, 1 Stat. 469. No part of New York State is within the area encompassed by the 1796 version

9. In addition to *Bates* and *American Fur*, this Court's dictum in *Seneca Nation v. Christy*, 162 U.S. 283 (1896), supports the view that ITIA did not apply to reservation land under the jurisdiction of New York State.



of ITIA. Moreover, section 19 of the 1796 version of ITIA explicitly provides that "nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States and being within the ordinary jurisdiction of any of the individual states. . . ." *Id.* at § 19. The 1793 version of ITIA, Act of March 1, 1793, ch. 19, 1 Stat. 329, likewise excluded from its operation "lands surrounded by settlements." *Id.* at § 13. Accordingly, by its own terms, post-1790 ITIA applies only to the frontier regions, and not to areas under the jurisdiction of the individual states.[10]

The Counties' interpretation of ITIA is supported by *Mitchel*, an 1835 decision involving Indian land claims in Florida in which the Court suggested that some states continued to have the authority to convey Indian lands, notwithstanding ITIA:

> Grants made by the Indians at public councils have since been made directly to the purchasers or to the state in which the land lies, in trust for them, or with directions to convey to them, ***of which there are many instances of large tracts so sold and held, especially in New York.***
>
> It was a universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states after the revolution ***and yet continues in those where the right to the ultimate fee is owned by the states*** or their grantees.

*Mitchel*, 34 U.S. at 748 (emphasis added).

10. Although the Second Circuit in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), distinguished *Bates* and *American Fur* and concluded that ITIA was not geographically limited as to land conveyances, *id.* at 627, the Counties submit that this reading is not justified as applied to the present parcels and is inconsistent with the authority of this Court. It is also contrary to the understanding of early jurists, as discussed below.

Likewise, in *New Jersey v. Wilson*, 11 U.S. 164 (1812), this Court made no mention of ITIA when discussing an 1803 conveyance to private parties by the Delaware Indians of their interest in a tract of land in New Jersey. Invalidating a New Jersey enactment that attempted to revoke the tax exempt status of the tract conveyed, the Court stated:

> It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege [tax exempt status] as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians.

*Id.* at 167. There is no indication that this Court considered the sale void for violating ITIA.

Attorney General William Wirt observed in 1819 that the states, including New York, stood in "precisely the same ground towards the Indians which the British King occupied" and "[a]s to the right of sale, the States of New York and Massachusetts, representing the sovereignty of the Crown in this respect, have regulated the manner in which it shall take place. . . ." Op. Att'y Gen. William Wirt (March 26, 1819) (appended hereto).[11] The United States reiterated this position before the Indian Claims Commission in 1955, with the added gloss that the 1794 Treaty of Canandaigua "was an

11. A June 16, 1795 opinion by Attorney General Bradford is sometimes cited as authority for the proposition that ITIA applied to New York. *See, e.g., Oneida Indian Nation of New York*, 434 F. Supp. at 534. Bradford himself, however, qualified his opinion, noting that "the documents submitted to the Attorney General" did not disclose "circumstances of the case under consideration to take it out of the general prohibition of [ITIA]." Op. Att'y Gen. William Bradford (June 16, 1795) (A50-A51). It is unknown to historians what documents Bradford considered beyond the statute and the treaties between New York and the Oneidas, Cayugas, and Onondagas. In any event, Bradford's opinion (insofar as the Oneidas are concerned) is founded upon the erroneous assumption that the 1788 Treaty of Fort Schuyler failed to extinguish Indian title. *Id.*



acknowledgement of the then well-known fact that" New York had the right to purchase the Indian lands, and that "the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales. . . ." (A43).

Chancellor Kent, in his influential *Commentaries on American Law* ("*Kent's Commentaries*"), observed that "the several local governments, before and since our Revolution, never regarded the Indian nations within their territorial domains as subjects," but nonetheless, "asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase." 3 *Kent's Commentaries* 384-85 (14th ed. 1896). Oliver Wendell Holmes, Jr., who edited the twelfth edition of *Kent's Commentaries* early in his career, also apparently believed the ITIA did not apply to Oneida land sales:

> So the Oneida Indians, owning lands in the counties of Oneida and Madison, were enabled, by the act of April 18, 1843, c. 185, to hold lands in severalty, and to sell and convey the same, under the care of a superintendent on the part of the state.

2 *Kent's Commentaries* 73 n.(a). Moreover, there is no mention in *Kent's Commentaries* that any of the numerous purchases by New York were thought to be in violation of ITIA.

## III. Even If The Oneidas Once Had A Federally Recognized Reservation, It Was Disestablished By The 1838 Treaty of Buffalo Creek Between the United States and the Six Nations

The briefs of Sherrill and other *amici* demonstrate that the United States in the 1838 Treaty of Buffalo Creek clearly intended to disestablish any Oneida Reservation. However, this Court has said that "even in the absence of a clear expression of congressional purpose [to diminish a reservation] unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (citing *Solem v. Bartlett*, 465 U.S. 463, 471

(1984)).[12] Further, "where non-Indian settlers flooded into . . . a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred." *Id.* at 356 (citing *Solem*, 465 U.S. at 471).[13] If the federal expression of intent was not clear, then the Court will examine other factors, including (a) events that occurred after 1838 and the subsequent treatment of the area; (b) established jurisdictional patterns and the development of justifiable expectations; (c) changes in the demographics of the area; (d) maps; and (e) administrative documents. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Solem, supra*; *Hagen v. Utah*, 510 U.S. 399 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

**A. Subsequent treatment of the area**

According to historian Laurence M. Hauptman, who has been employed by several tribes including the Wisconsin Oneidas as a historical consultant, "[t]he process of Oneida dispossession and removal had been set in motion as early as the end of the American Revolution. . . ." Hauptman, *Conspiracy of Interests*, at 57 (1999) (SCJA 1006). Hauptman identifies a number of factors that contributed to the removal of the Oneidas:

- Hopeless division among the Oneidas. (SCJA 1005);
- A "flood of settlement into their central New York State homeland." (SCJA 1004);
- A "vast conspiracy of interlocking forces - land and transportation interests," which led to the development of canals (including the Erie Canal), railroads and roads. "No other Indian community in New York State was affected more by the transportation revolution than the Oneidas." (SCJA 1002);
- National security concerns and forty years of tension and wars with Great Britain (including the War of 1812) which caused American policymakers (including John C. Calhoun, secretary of war from 1817 to 1825) to formulate both defense and Indian policies which had a goal of removing Indian tribes from New York State. (SCJA 998-1001); and
- The federal government's failure to carry out its fiduciary responsibilities to the Indians. (SCJA 1003).

The area from which the Oneidas removed was located within both Madison County (created in 1806) and Oneida County (created in 1798). As Oneida lands were transferred to New York State, they were surveyed and laid out in townships, which were in turn subdivided into sections and the sections into lots. These towns included Cazenovia, Fenner, Lenox, Smithfield, Stockbridge and Sullivan in Madison County and Augusta, Vernon and Verona in Oneida County. The townships were settled by non-Indians, who started churches and schools; set up banks, factories, mills and shops; established local governments, courts, post offices, police forces and fire departments; organized bands, professional societies, seminaries and fraternal societies; and by 1880 covered the area with non-Indian culture. (SCJA 1013-1176).

By 1890, the small remnant of Oneidas who had not removed were living among their non-Indian neighbors "off reservation." (SCJA 993, 994). At all times since, the area has been treated as non-Indian except for a 32-acre parcel currently under BIA jurisdiction, title to which is recorded in the name of an individual Oneida Indian. (SCJA 1177-1179).

**B. Established jurisdictional patterns and justifiable expectations**

First published in 1942 under the authority of the Department of Interior, Felix S. Cohen's *Handbook of Federal Indian Law* was updated and republished in 1958 and 1982 ("Cohen"). In the 1942 edition, Cohen reported that "[t]he State

---

12. This Court recently considered in detail (based on a record developed in a nine-day trial) both the negotiating history and subsequent events in determining congressional intent with respect to whether an Indian reservation in Idaho included certain submerged lands. *Idaho v. United States*, 533 U.S. 262 (2001).

13. The terms "diminishment" and "disestablishment" have sometimes been used interchangeably. "Diminishment" refers to the reduction in size of a reservation. "Disestablishment" generally refers to the elimination of a reservation. The Oneida reservation in New York was disestablished.

of New York has for 100 years or more legislated for and dealt with the Indians within its borders." *Id.* at 419. In the chapter on New York Indians, Cohen does not even include the Oneidas in his discussion of "[t]he present status of tribal government." The reason is found in a footnote:

> The Oneidas also, by various treaties, sold all of their land, except about 350 acres, to the State, and removed to the reservation in Wisconsin procured from the Menominees by the Federal Government. The 350 acres in New York belonging to the Oneidas have long since been divided in severalty under State laws, and as a tribe these Indians are known no more in that State.

*Id.* at 966-967 n.1 (internal quote omitted).

The same conclusion had been reached by a federal court decades earlier in *United States v. Elm*, 1877 U.S. Dist. LEXIS 44 (N.D.N.Y. Dec. 24, 1877). Elm was an Oneida Indian who lived his entire life in Madison County. He voted in the congressional election of 1876, claiming to be a U.S. citizen. He was indicted, tried and convicted of voting illegally. The question presented on a motion for a new trial was whether or not the Oneida Indians are citizens of the U.S. and, as such, entitled to vote. The answer to this question turned on whether the Oneidas maintained their tribal integrity, and whether Elm continued to recognize his tribal relations.[14] In reversing his conviction and granting a new trial, the court wrote:

> In 1822 the supreme court of this state decided, in *Jackson v. Goodell*, 20 Johns. 187, that the Indians resident in this state were citizens, but that decision was reversed by the court of errors. Since that decision, however, great changes have taken place in the social and political relations between the Indians and the body of citizens at large, as is well illustrated by the history of the Oneidas. By treaties

14. The Act of June 2, 1924 made "all non-citizen Indians born within the territorial limits of the United States" citizens of the United States. 8 U.S.C. § 1401(b) (1999) (originally 43 Stat. 253). Thus, under modern law, all Indians are citizens of the United States.



> between the United States and the Six Nations, the Menomonies, and Winnebagoes in 1831 and 1838 the Six Nations acquired extensive cessions of lands in Wisconsin near Green Bay; and about that time the main body of the Oneidas removed to these lands. Since then, the tribal government has ceased as to those who remained in this state. It is true those remaining here have continued to designate one of their number as chief, but his sole authority consists in representing them in the receipt of an annuity which he distributes among the survivors. The 20 families which constitute the remnant of the Oneidas reside in the vicinity of their original reservation. They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population.

The local histories discussed in subsection A. above and the court's findings in *Elm* show that, beginning in the second half of the nineteenth century, the established jurisdictional patterns in central New York were non-Indian. "[A]s a tribe [the Oneidas] are known no more in that State." Cohen, at 966-67 n.1. In short, the jurisdictional patterns and justifiable expectations in the area are that the ancient state reservation was long ago disestablished and that the area is subject to non-Indian jurisdiction.

**C. Changes in the demographics of the area**

The demographics of the area changed dramatically in the decades before and after 1838, as the following table from *Conspiracy of Interests* shows:

"Population Increases in Madison and Oneida Counties, New York, 1790-1855"

| | YEAR | | | | |
|---|---|---|---|---|---|
| | 1790 | 1800 | 1814 | 1825 | 1840 | 1855 |
| Madison | — | 8,036 | 26,276 | 35,646 | 40,008 | 43,687 |
| Oneida | 1,891 | 20,839 | 45,627 | 57,847 | 85,310 | 107,749 |

(SCJA 997). As the flood of non-Indian settlers increased, the removal of the Oneidas continued. According to the 1870 Census of Oneida County, the Towns of Augusta, Vernon and Verona had the following populations:

| Town | Total Population | Indians |
|---|---|---|
| Augusta | 2067 | 0 |
| Vernon | 2840 | 45 |
| Verona | 5757 | 0 |

(SCJA 1190). According to the 1870 Census of Madison County, the Towns in the former reservation area had the following populations:



| Town | Total Population |
|---|---|
| Cazenovia | 2,132 (one-half of 4,265 since *only* the northern half of Cazenovia is in the area) |
| Fenner | 1,381 |
| Lenox | 9,816 |
| Smithfield | 1,227 |
| Stockbridge | 1,847 |
| Sullivan | *4,921* |
| TOTAL | 21,324 |

No Indians are recorded. (SCJA 1198). By 1890, there were 106 Oneidas living off-reservation in the area. (SCJA 993). This number of Oneidas compares to 1890 populations of 42,892 in Madison County, and 122,922 in Oneida County. (SCJA 1164, 1208).

As of 1999, there were an estimated 744 Indian, Eskimo and Aleut (most of whom are presumably Oneida Indians) living in Madison (285) and Oneida (459) Counties out of a total estimated population of 300,841 (71,127 in Madison County and 229,714 in Oneida County). (SCJA 1213-1214). Thus, the combined Indian, Eskimo and Aleut populations constitute approximately .25% of the total population of Madison and Oneida Counties (conversely, the Counties are 99.75% non-Indian).

### D. Maps

The map of New York in *The Six Nations of New York 1892 United States Extra Census Bulletin* shows all the reservations of the Six Nations in the State, and there is no Oneida reservation. (SCJA 995). The absence of an Oneida reservation is confirmed by maps issued by the United States Geologic Survey in the Department of Interior. Neither the Oneida map from the Edition of 1902 nor the Utica map from 1985 shows any Oneida reservation. By comparison, the Tully map from the Edition of 1900 and the South Onondaga map edited in 1973 both show the Onondaga Indian Reservation. (SCJA 1215-1218). Maps of

Madison County and the towns within the area of the former Oneida reservation from the 1875 Atlas of Madison County make no reference to the Oneida reservation. (SCJA 1199-1205).

Some commercially published maps refer to the former location of the Oneida Indian Reservation. An earlier map of Oneida County in the 1874 Oneida County Atlas makes no reference to any Oneida reservation. However, maps of the Towns of Verona and Vernon from the same atlas make reference to "Oneida Reservation" (without boundaries). (SCJA 1191, 1193, 1196). These references to "Oneida Reservation" appear to refer to the general area of the former reservation as a matter of historical interest. It is clear from the Court's findings in *United States v. Elm*, 1877 U.S. Dist. LEXIS 44, that there was no Oneida tribe or tribal government in the area by 1877, and there was a mere "remnant of the Oneidas [residing] in the vicinity of their original reservation."

The Counties acknowledge that some maps of Madison and Oneida Counties include the words "Oneida Reservation" across unbounded areas, similar to the maps of the Towns of Vernon and Verona referred to above. (SCJA 1219-1220). However, the area of the former Oneida reservation is overlaid with substantial detail of non-Indian development, settlement, subdivisions, surveys, and local governments. General references to "Oneida Reservation" on maps, without more, have "limited interpretive value" and "cannot be said to be a considered jurisdictional statement regarding the specific status of . . . Indian lands." *Yankton Sioux Tribe*, 188 F.3d at 1029 n.11 (citations omitted).

**E. Administrative documents**

The Acts of Congress and the 1838 Treaty of Buffalo Creek, discussed in detail in Oneida Ltd.'s *amicus* brief, (SCJA 879, 886-907), demonstrate Congress' intent to remove the Oneidas from New York State and to disestablish the Oneida reservation. In addition, the 1892 Census Bulletin, (SCJA 990-995), and the following administrative



documents confirm that the Oneida reservation in New York was disestablished:

- *1877* Annual Report of the Commissioner of Indian Affairs for the Year 1877, at 168. Reporting that some Oneidas lived on the reservations of the Onondagas and Senecas of Tonawanda, but that most lived "on detached farms" partitioned "from their former reservations in the counties of Oneida and Madison." (SCJA 1222).
- *1890* Annual Report of the Commissioner of Indian Affairs 1890, at XXVII. Reporting that the "Oneida Reserve . . . consists of detached farms held in severalty by the heads of families and contains in all about 350 acres." (SCJA 1226).
- *1891* Annual Report of the Commissioner of Indian Affairs 1891, at 314:

> The Oneida Indians have no reservation, their lands having been divided in severalty among them by act of the legislature many years ago.
>
> * * *
>
> The Oneida have no tribal relations, and are without chiefs or other officers.

(SCJA 1228-1229).

- *1893* Annual Report of the Commissioner of Indian Affairs 1893, at 223. Reporting that the "Oneidas have no reservation. Most of the tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land . . . divided in severalty among them and they were made citizens." (SCJA 1230-1231).
- *1900* Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1900, Report Concerning Indians in New York, at 298:

> The Indian reservations. There are six Indian reservations in the agency, which extends over the State of New York. The names, location and acreage of the reservations are as follows: Allegany . . . Cattaraugus . . . Onondaga . . . St. Regis . . . Tonawanda . . . Tuscarora . . .
>
> . . . The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison Counties, in the vicinity of the Oneida Reservation, which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin.

(SCJA 1232-1234).

The 1901 Annual Report at 288 is to the same effect. (SCJA 1236-1239). And the 1906 Annual Report at 288 states, "[t]he New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence." (SCJA 1240-1241).

Responding to corre nce from the United States Attorney, Northern Distric. of New York, asking about the Oneida reservation in New York, the Assistant Commissioner of Indian Affairs stated:

> In answer you are advised that in the Fall of 1914 a representative of this Office was detailed to investigate conditions on the Indian reservations in the State of New York; and in his report dated December 26, 1914, he set out clearly the status of the lands of the Oneidas as follows:
>
> The Oneidas also, by various treaties, sold all of their land, except about 350 acres, to the State, and removed to the reservation in Wisconsin procured from the Menominees by treaty with the Federal Government. The 350 acres in New York belonging to the Oneidas have long since been divided in severalty under State laws, and as a tribe these Indians are known no more in that State.



(SCJA 1246-1247).

A letter from the Assistant Commissioner of Indian Affairs dated March 14, 1924, referring to the 1920 decision of the Second Circuit in *United States v. Boylan*, 265 F. 165 (2d. Cir. 1920)[15] advised:

> This Office has no knowledge of any steps having been taken by the Government for the purpose of contesting or voiding the present titles to the lands in controversy.
>
> So far as this Office is aware, there is but little, if any, merit in the legal claim of the Six Nations

15. In *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921)), the district court dealt with the 32 acres in Madison County currently under the jurisdiction of the Bureau of Indian Affairs. In fact, the *Boylan* decisions recognize that the Oneida Reservation had been reduced (or diminished) and recognize that "the right was given to the Indians as a tribe to dispose of their lands in the State of New York, if they decided to move to Green Bay and there accept other lands allotted to them. After this, the Indians remaining held a single and undivided tract out of the original Oneida reservation." *Id.* 265 F. at 167. (The District Court's opinion in *Boylan* indicates that as of 1906, "the Oneida reservation still existed, although reduced in area." 256 F. at 481.) Thereafter in the treaty of 1842, as authorized by the 1838 Treaty of Buffalo Creek, the State arranged to purchase the portion of the reservation that represented the equitable share of the Oneidas who emigrated to Green Bay in 1842. *Id.* 265 F. at 168. Thus, the court recognized the effect of the treaty of 1842 as further diminishing the Oneida reservation. The court then went on to discuss the particular land in question and found that "[n]o partition was ever made of lots 17 and 19 by the tribe or band of Indians, as required by Chapter 420, [New York] Laws of 1849." *Id.* 265 F. at 170. Further, since "Congress has never legislated so as to permit title to pass from the Indians to the lots here in question [to aliens]" the Court affirmed, concluding that the partition action, judgment and sale made thereunder were void. *Id.* 265 F. at 173, 174. The *Boylan* case does not support the continued existence of the ancient Oneida Reservation acknowledged in the 1794 Treaty of Canandaigua, although it helps to explain why the 32 acres is currently under BIA jurisdiction.

> against the State of New York for lands heretofore conveyed for valuable considerations to that State by the Oneida tribe.

(SCJA 1248-1249).

A letter from the Assistant Commissioner of Indian Affairs dated January 7, 1925 stated: "Furthermore, the Oneida Indians years ago disposed of their lands in New York State and removed to a reservation in Wisconsin. As a tribe these Indians are no longer known in the State of New York." (SCJA 1250).

A letter from the Commissioner of Indian Affairs dated June 14, 1931 distinguished the *Boylan* case from lands formerly owned by Lydia B. Doxtater, a deceased Oneida Indian, on the grounds that

> [T]he Boylan case dealt with lands retained by the Oneida Indians as a tribe, as a part of their original domain or "reservation" in the State of New York, while the lands formerly owned by Mrs. Doxtater, as pointed out to you in our prior letter, were ceded and sold to the State of New York by the Oneida tribe in 1840 and were subsequently acquired in 1907 by Mrs. Doxtater, as an individual, in her private capacity, with her own funds, from private parties, patentees of the State of New York or their assignees.
>
> There is a substantial fundamental difference, of course, between restricted Indian property over which the Federal Government exercises beneficent supervision or control, and unrestricted Indian property acquired by individual Indians by their own industry or with their own unrestricted funds. With the former we have considerable to do but with the latter practically nothing. . . .

(SCJA 1251).



Three 1939 letters likewise confirm that the Oneida Reservation no longer exists. (SCJA 1252-1254). The Statistical Supplement to the Annual Report of the Commissioner of Indian Affairs for the Fiscal Year ended June 30, 1942, shows 30 acres of "Trust Allotted" land for the Oneida (New York) without further explanation. (SCJA 1256). And more recently, the Annual Report of Indian Lands, U.S. Department of the Interior, Bureau of Indian Affairs, Table of Lands under the Jurisdiction of The Bureau of Indian Affairs as of December 31, 1997 shows no land in Oneida County, New York and only 32 acres in Madison County, New York. (SCJA 250).

Except possibly for the 32 acres, there has been no Oneida reservation and the area is and has been under non-Indian jurisdiction for nearly 200 years. Both as a matter of law and as a matter of fact, the ancient Oneida Reservation in New York was long ago disestablished.

## IV. The Second Circuit's Decision Below Is Inconsistent With State Sovereignty Preserved To New York (And The Counties) By The Tenth Amendment To The Constitution Of The United States

The Second Circuit's decision violates the Tenth Amendment because it unnecessarily diminishes the sovereignty of the State of New York (and the sovereign powers delegated to the Counties). This is so for two separate reasons. First, as discussed above, the parcels at issue have been New York land since 1788 when they were ceded to New York and Indian title was extinguished. Second, even if Indian title was not extinguished, New York has exerted unchallenged *de facto* sovereignty over the former Oneida reservation for more than 200 years. In either case, the Tenth Amendment prohibits the Oneidas from unilaterally creating, in piecemeal fashion, a separatist enclave in the middle of New York that is free from state and local law.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court explained that "[a]lthough the Constitution establishes a

National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Id.* at 713 (citation omitted). A State's power over its own territory and transfers of property within its territory are an integral part of State sovereignty. *See, e.g., Northern Sec. Co. v. United States*, 193 U.S. 197, 347 (1904) ("a State has plenary powers over its own territory, its highways, its franchises, and its corporations" (internal quotes and cites omitted)); *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664, 671 (1876) ("every State has the right to regulate the transfer of property within its limits"). So, too, is the right to enter into contracts and (before the Constitution) treaties. *See, e.g., United States v. Bekins*, 304 U.S. 27, 51-52 (1938) ("It is the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power").

The 1788 Treaty of Fort Schuyler - signed before the Constitution created our National Government - extinguished the Oneidas' Indian title to their ancient domain. *See Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1159-60 (2d Cir. 1988). As discussed above, the Oneidas' ceded ***all*** their territory to New York State, including the parcels at issue. The Oneidas' land thus became New York's land, subject to New York sovereignty. *See, e.g., Johnson v. M'Intosh*, 21 U.S. 543, 584 (1823). In exchange for relinquishing their aboriginal title, the Oneidas secured from New York certain rights created and defined by New York state law. *See Goodell v. Jackson*, 20 Johns. at 729. The National Government, which did not exist when the 1788 Treaty of Fort Schuyler was signed, by definition had no authority over the scope or effect of the 1788 Treaty. *Cf. Cook v. Harman*, 531 U.S. 501, 522-23 (2001) (Powers granted by Constitution can "not precede their very creation by the Constitution"). The Second Circuit's conclusion that Indian title quietly survived for more than 175 years (apparently unknown to the federal government, the Oneidas, New York State and the Counties) and that New York ceded those lands to the federal government when the



Constitution was ratified, *see Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 146, 156 nn. 5, 13 (2d Cir. 2003), is incorrect for the reasons discussed above.

However, even if this Court were to accept the Second Circuit's interpretation of the relevant treaties and history, it should not allow the Oneidas unilaterally to destroy 200-years of *de facto* New York sovereignty. The National Government never sought to exert sovereignty over the former "reservation" or otherwise superintend the Oneidas. Instead, New York State (and the Counties and other local governments) have held uncontested sovereignty over the entire area for almost 200 years. As the Court noted in *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 370 (1859), speaking of lands in possession of the Seneca Indians:

> Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered.

In the pending Lands Claim Case, No. 74-CV-187 (N.D.N.Y), the Oneidas are seeking to vindicate possessory rights to their former "reservation." If successful, they will receive an appropriate remedy. It does not follow, however, that the Oneidas are entitled to found a separate nation in the middle of New York State and oust its sovereign power. Such a result is not required by *Oneida II* or other federal law, and is fundamentally at odds with the Tenth Amendment in this case. *Cf. Nevada v. Hicks*, 533 U.S. 353, (2001) ("State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within

reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State"). As the Towns of Lennox, Stockbridge and Southampton argue in Part III of their *amici* brief, where there has been no Oneida "reservation" for centuries - and state and local government have always exerted plenary authority over the territory - state and local sovereignty should continue, irrespective of who has the right to possess the land.

By circumscribing New York's control over territory to which it exerted sovereignty, either *de jure* or *de facto*, since before the Constitution was ratified, the Second Circuit violated the Tenth Amendment.

## CONCLUSION

For the reasons stated herein, as well as those stated by the City of Sherrill and other *amici*, the Court should reverse the court below.

Respectfully submitted,

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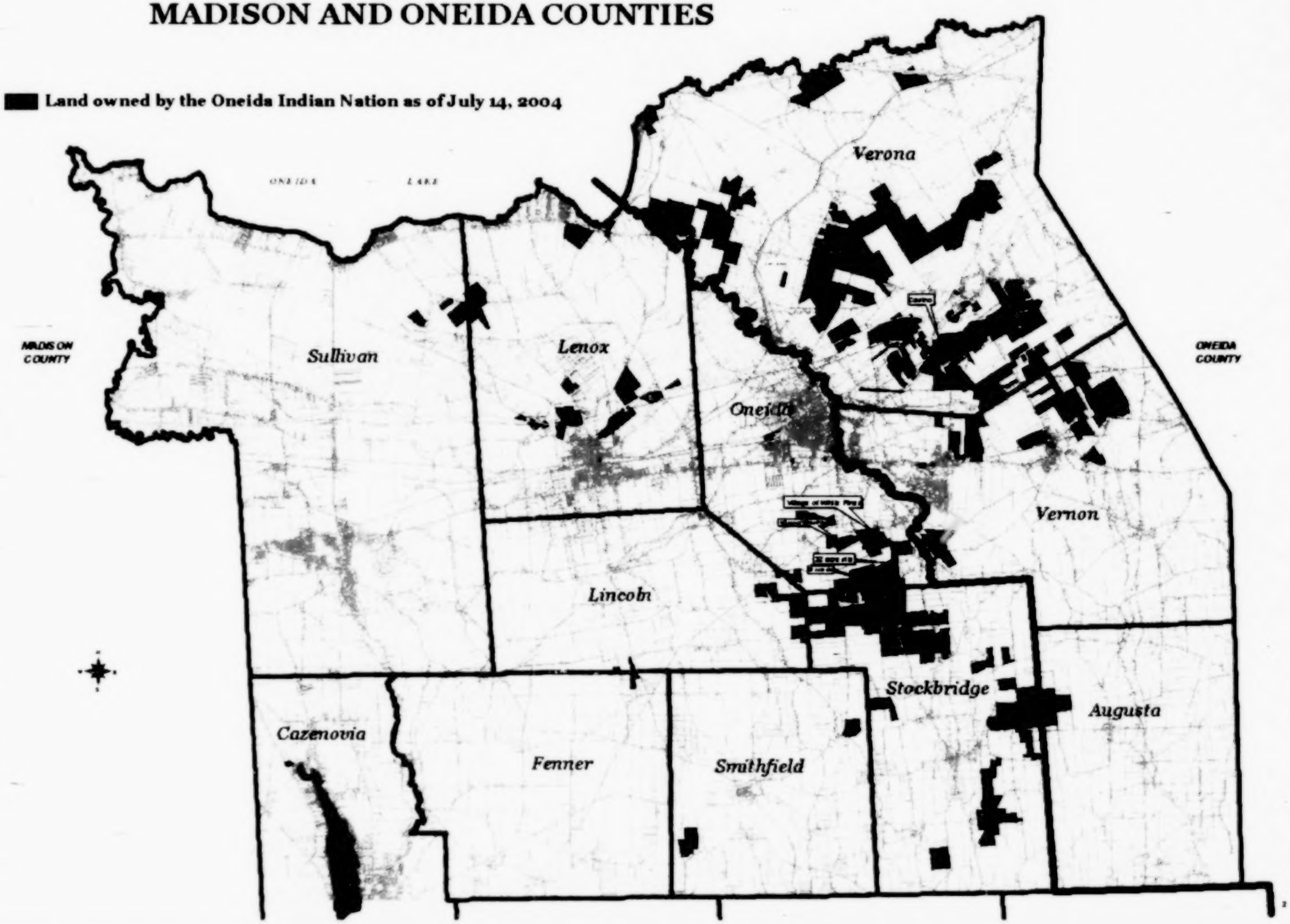
# SELECTED AREAS OF MADISON AND ONEIDA COUNTIES

Land owned by the Oneida Indian Nation as of July 14, 2004



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IN THE
# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,
*Petitioner,*

v.

ONEIDA INDIAN NATION OF NEW YORK, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages, including New York tribes. NCAI is dedicated to protecting the rights and improving the welfare of American Indians. This case calls for the straightforward application of longstanding principles regarding treaty interpretation and tribal tax immunity. However, the City of Sherrill argues against the application of those principles based on vastly exaggerated claims of the hardship allegedly resulting from an adverse decision. While the practical consequences of the Court's decision here would largely be confined to New York's political subdivisions and tribes, NCAI and its members have a strong interest in opposing the abandonment of time-honored principles of Indian law based on arguments properly addressed to Congress, not this Court.

## INTRODUCTION

Beginning in 1795, New York purchased 300,000 acres of land reserved to the Oneida Nation ("the Oneida") in plain violation of federal law. The Oneida were thereby ousted from these lands, but never lost their treaty-protected aboriginal rights of possession. Only the United States could strip the Tribe of those rights. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230-34 (1985) ("*Oneida II*"). Between that time and the present, the lands have passed from New York to third-party purchasers.

Many eastern states that engaged in comparable courses of conduct have fashioned comprehensive land-claims solutions

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[1] No one other than NCAI made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief *amicus curiae*, and the letters of consent have been filed with the Clerk.

seeking to balance the interests of tribes and landowners potentially affected by the States' illegal actions. Congress has approved those settlements. See 25 U.S.C. ch. 19. New York, however, has refused to provide Tribes within its borders with meaningful redress for its past wrongs. Given New York's intransigence, the Oneida decided to purchase parcels of lost lands in free market transactions at fair market prices, in order to reactivate the treaty and aboriginal rights inherent in tribal possession of the parcels, including an immunity from state and local taxation.

New York, the original lawbreaker in this case, cries foul on behalf of the third-party interests created by the passage of time (of course, the Oneida paid third parties fair market price to take possession). But, the actual goal of New York and its subdivisions is to retain the long-term benefits of their illegal conduct – the ability to tax not only non-Indian lands but also tribal lands in the Oneida reservation. At the end of the day, New York and its subdivisions should not be permitted to retain the fruits of their defiance of federal law, and the Oneida's reacquisition of wrongfully transferred lands in the reservation should restore those parcels' tax-immune status.

Absent express congressional authorization, state and local governments may not tax tribal lands in an Indian reservation. See *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995); *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *N.Y. Indians*, 72 U.S. (5 Wall.) 761 (1866); *Kan. Indians*, 72 U.S. (5 Wall.) 737 (1866). The parcels at issue are owned by the Oneida; they constitute part of the land "reserved" to the Oneida "forever" in the 1788 Treaty of Fort Schuyler ("1788 Treaty"). Pet. App. A136-37. In the 1794 Treaty of Canandaigua ("1794 Treaty"), the United States "acknowledge[d]" these lands "to be [the Oneida's] property" and promised that the same "reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Id.* at A141. The United States has never terminated the reservation.



"Despite Congress' clear policy" to the contrary, between 1795 and 1846, New York entered into a series of transactions through which it acquired most of the Oneida reservation, including the parcels at issue. See *Oneida II*, 470 U.S. at 232. With a single exception not relevant here, these transactions occurred without the consent of the United States. Pet. App. A8-9. To regain possession of these parcels, the Oneida paid fair market value to non-Indian landowners in free market transactions. These facts should end this matter. Illegal transactions cannot and did not terminate the Oneida's aboriginal rights in their reserved lands, as this Court has already made clear. *Oneida II*, 470 U.S. at 234. Thus, once the Tribe regained possession, its treaty and aboriginal rights were reinvigorated, including the parcels' immunity from state and local taxation.

Sherrill, however, claims that it may tax the parcels at issue for several reasons: (a) The lands were never part of a federal reservation and are not otherwise within Indian country as defined by federal law; (b) assuming the lands are part of a federal reservation and are now tribal lands, they are freely alienable and thus subject to state and local taxation; and (c) assuming the lands were part of a federal reservation, that reservation was diminished or disestablished by the 1838 Treaty of Buffalo Creek.[2]

NCAI agrees with respondents that Sherrill's first two arguments are answered in large part by *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 678 (1974) ("*Oneida I*") and *Oneida II*, where this Court found that after adoption of the Constitution and enactment of the Trade and Intercourse Act of 1790 (known as the "Nonintercourse Act"), sales of land in the precise area were unlawful absent federal consent. In this brief, however, NCAI independently shows that application of the fundamental principles of Indian

[2] NCAI does not address Sherrill's fourth argument concerning tribal continuity that is addressed in respondent's brief and the briefs *amicus curiae* of the United States and the United Southern and Eastern Tribes.

law that govern this case leads to the same conclusions – that the parcels are part of a federal reservation and thus in Indian country, and that tribal lands in the reservation are immune from state and local taxation because the United States has never authorized such taxation and has never diminished or disestablished the reservation.

## SUMMARY OF ARGUMENT

When the European powers "discovered" North America and entered into their relationships with North American tribes, the "discovery doctrine" was the international law principle which reconciled European concepts of land ownership and sovereignty with aboriginal possession. See F. Cohen, *Handbook of Federal Indian Law* 50-54 (1982 ed.) ("*Cohen Handbook*"); F. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 45 (1947). Pursuant to this doctrine, discovering European nations possessed the right to exclude other European powers from discovered lands and the exclusive rights to purchase Indian lands and to extinguish aboriginal title. The tribes lost their sovereign right to conduct foreign relations with other European nations and the right independently to alienate their lands. See generally *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 573-74 (1823). Otherwise, the tribes retained sovereignty in their territory and an aboriginal right of occupation "as sacred and as securely safeguarded as is fee simple absolute title." *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938).

The United States Constitution incorporated discovery doctrine principles by centralizing in the federal government the exclusive authority to conduct relations with tribes, including the right to extinguish Indian title and allow the alienation of tribal lands. The Constitution:



> confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. *These powers comprehend all that is required for the regulation of our intercourse with the Indians.* [*Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis supplied).]

The tribes were otherwise recognized as sovereign over their internal affairs and lands. *Id.* at 551-53. In 1790, Congress exercised its exclusive authority by enacting the Nonintercourse Act, forbidding trade with Indians (absent federal authorization) and requiring that all sales of Indian lands be the product of a federal treaty or convention. See Act of July 22, 1790, ch. 33, 1 Stat. 137 (codified as amended in part at 25 U.S.C. § 177).

These principles of federal exclusivity and retained tribal sovereignty left state and local governments without jurisdiction over tribal Indians and lands within "Indian country," including jurisdiction to tax tribal lands, absent express federal authorization.

"Indian country" includes, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). An express congressional authorization is an absolute prerequisite to state or local taxation of *tribal* land in Indian country. See *supra* at 2. The parcels at issue were "reserved" to the Oneida "forever" by the 1788 Treaty, and that reservation was "acknowledged" and affirmed by the United States in, *inter alia*, the 1794 Treaty. As this Court recognized in *Oneida II*, an illegal transaction does not alter aboriginal rights of possession; the Oneida's possessory rights persisted in the "reserved" lands unlawfully alienated without federal approval. 470 U.S. at 230-34. In such circumstances, once the tribe pays non-Indian third parties fair value, the tribe's repossession of

reserved aboriginal lands reactivates the lands' immunity from state and local taxation.

Sherrill's responses are without merit. *First*, Sherrill claims that the 1788 Treaty terminated the Oneida's aboriginal rights of possession (rather than "reserving" those rights "forever") before the Constitution was adopted (though after the requisite total of nine states, including New York, signed it), and therefore that the nascent federal government lacked authority over Oneida lands and the Nonintercourse Act never applied. Under this view, neither the 1794 Treaty nor any of the United States' other agreements with the Oneida could have established a federal Oneida reservation that is "'Indian country'" under 18 U.S.C. § 1151 and *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

This is plainly wrong. Even assuming that during the period from independence to the effective date of the Constitution, New York shared with the United States the *right* to extinguish aboriginal rights, the tribes retained those rights unless they actually were extinguished. Although New York purchased vast Oneida lands before the Constitution was adopted, the 1788 Treaty plainly did not terminate the Oneida's rights of possession in the discrete tract of land carved from the general cession, but instead explicitly "reserved" those rights "forever." This is the clear meaning of the treaty language. See *Winans* v. *United States*, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted"). If any doubt existed, the trust obligation that the colonies inherited from the Crown as discovering sovereign required that the 1788 Treaty be interpreted as the Tribe understood it. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Worcester*, 31 U.S. at 552. The Oneida would not have understood the 1788 Treaty to terminate aboriginal rights; the Treaty "reserved" rights and the Tribe *retained* possession.



Even if the 1788 Treaty had created a bizarre, new state-law property interest unrecognizable in its historical and legal context – simultaneously terminating and reserving the Oneida's rights of possession – the Constitution and the Nonintercourse Act nonetheless provided the United States with *exclusive* authority to extinguish the Oneida's retained rights. The Act forbids unauthorized sales of tribal lands, including "to any state, whether having the right of pre-emption to such lands or not." Ch. 33, § 4, 1 Stat. at 138. See *Oneida I*, 414 U.S. at 678 (Nonintercourse Act codifies the principle "that the extinguishment of Indian title require[s] the consent of the United States").

Sherrill's alternative formulation – that a reservation is not within "Indian country" unless it is both set aside *and* actively superintended by the federal government – relies on *Venetie*. *Venetie* is inapposite here because it addresses a different type of "Indian country" – "dependent Indian communities," 18 U.S.C. § 1151(b) – in circumstances where Congress explicitly *terminated* the federal reservation. See 522 U.S. at 527.

*Second*, Sherrill contends that, even if the parcels at issue are in a federal reservation, they are subject to state and local government taxation until the federal government sets them aside again. According to Sherrill, the lands must be taxable because they have become freely alienable; Sherrill's apparent belief is that the lands are owned by the Tribe acting just like any private participant in the commercial marketplace. The premise and conclusion of this argument are wrong. Unlawfully-transferred reservation lands restored to tribal possession by purchase from non-Indian owners are *not* alienable without federal authorization under the plain language of the Nonintercourse Act. Moreover, the decisions Sherrill cites – *County of Yakima* v. *Confed. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), and *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) – rested on the Court's view that Congress

*expressly authorized* both the alienation and taxation of those lands by statute and that tribal reacquisition cannot repeal the taxing authorization in a federal statute. Here, in sharp contrast, no congressional authorization of either sale or taxation exists; to the contrary, tribal reacquisition remedies an illegal transaction, restores a tax immunity unlawfully divested, and reactivates the Nonintercourse Act's restrictions on alienability.

*Third*, Sherrill contends even if the lands at issue were part of a federal reservation, the reservation was disestablished by the 1838 Treaty of Buffalo Creek. This Court, however, has refused to find that a treaty disestablishes a reservation unless the parties' agreement to do so is "'clear and plain.'" *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The text of the Treaty of Buffalo Creek by itself defeats Sherrill's claim that the Treaty mandated the removal of the Oneida from their New York reservation to the Kansas Territory. Moreover, in terms that could not be clearer, the government agent who negotiated the treaty assured the Oneida that they would not be compelled to remove and could "choose to . . . remain where they are forever." JA 146; Pet. App. A35 n.18. Sherrill's argument (and that of its *amici*) amounts to an unsupported contention that the Court should ignore this dispositive evidence regarding the Treaty's meaning. But see *Mille Lacs*, 526 U.S. at 196. The altered regional demographics on which Sherrill relies are the result of unlawful transactions, not the Treaty of Buffalo Creek, and cannot by themselves work a *de facto* disestablishment of a federal reservation.

Sherrill and its *amici*'s remaining arguments seek to portray the consequences of this case as so extreme that the Court cannot apply the federal Indian law principles that govern. Specifically, they say that state and local governments will suffer a crippling blow to their tax revenues and overall fiscal health. Putting aside the extra-legal nature of these assertions – which should be directed to Congress, not this



Court – the argument suffers from several fatal flaws. Because other States facing New York's situation have settled their tribes' land claims, the practical consequences of the Court's decision are limited to New York, which could likewise enter into such an agreement. Further, this case addresses only the tax-immune status of reservations lands *possessed by the Tribe*. The Oneida do not assert a tax immunity for most of the reservation which is owned by non-Indians; and this Court has severely limited tribal jurisdiction and authorized state taxation of non-Indian reservation lands and activities. See *Montana* v. *United States*, 450 U.S. 544 (1981). In addition, as the brief *amicus curiae* of the Puyallup and Southern Ute Tribes, and Pueblo of Acoma demonstrates, numerous tribes and state and local governments (including the Oneida) have reached agreements concerning tribal payment for government services. Sherrill should not be permitted to translate its refusal to accept such proposals into an argument that the law should be ignored. Neither law nor facts support Sherrill's alarmist rhetoric.

## ARGUMENT

### I. THE RULE THAT TRIBAL RESERVATION LANDS ARE EXEMPT FROM STATE AND LOCAL TAXATION CLEARLY APPLIES HERE.

The foundational rules of Indian law include federal exclusivity in dealing with Indian tribes, tribal sovereignty within Indian lands, a unique federal-tribal trust relationship, and the absence of inherent state jurisdiction with regard to tribal Indians and lands. The immunity of Indian lands from state and local property taxes flows naturally from the general immunity of tribal lands from state laws. See *Yakima*, 502 U.S. at 258; *N.Y. Indians*, 72 U.S. at 768-70; *Kan. Indians*, 72 U.S. at 740. And, this Court has defined that immunity in categorical terms. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("In the special area of state taxation of Indian tribes and tribal

members, we have adopted a *per se* rule. . . . [A]bsent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands . . . ."). The parcels at issue are immune from Sherrill's taxation because they are tribal lands in a federal reservation, and because Congress has never authorized their taxation. NCAI addresses three of Sherrill's attacks on this unexceptional application of established law.

### A. The Lands At Issue Are In "Indian Country."

Sherrill incorrectly argues that the general rule of tax immunity does not apply because the parcels at issue are not "Indian country." See 18 U.S.C. § 1151. First, the parcels are part of a federal reservation and, second, that reservation is, by definition, "Indian country."

1. Following the Revolutionary War, "the National Government promised that the Oneidas would be secure 'in the possession of the lands on which they are settled,'" *Oneida II*, 470 U.S. at 231, a promise that was acknowledged and reaffirmed in the 1794 Treaty of Canandaigua, Pet App. A141, as well as in a congressional resolution and two other treaties.[3] Article 2 of the 1794 Treaty "acknowledges" the 300,000 acres "reserved to the Oneida" in the 1788 Treaty "to be their property" and agrees that "the said reservation shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."[4] *Id.*

[3] *See* 25 J. Cont. Cong. 687 (Oct. 15, 1783); Treaty with the Six Nations [Ft. Stanwix], art. II, 7 Stat. 15, 15 (1784); Treaty with the Six Nations [Ft. Hamar], art. 3, 7 Stat. 33, 34 (1789). *See Oneida II*, 470 U.S. at 231.

[4] Making a wholly new argument, Sherrill characterizes this language as a federal pre-approval of the Oneida's free alienation of tribal lands, an astonishing interpretation that is completely inconsistent with any contemporaneous understanding of the Treaty. The language granting the "people of the United States" a right to *purchase* Oneida lands casts no doubt on the federal government's *exclusive power to authorize such a purchase*. Sherrill's reading would also mean that the Treaty preapproved private purchases from the Seneca without express federal approval



Article 3 of the 1794 Treaty explicitly establishes a reservation for the Seneca. See Pet. App. A141; *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 122-23 n.18 (1960). It also guarantees the Seneca's right to certain lands in virtually the same language used to indicate that the Oneida reservation had been federally acknowledged and guaranteed in Article 2. See Pet. App. A142. Article 4 of the 1794 Treaty states that "[t]he United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas," and agrees that the United States will "never . . . claim the same" and will "not disturb them . . . in the free use and enjoyment thereof." *Id.*

The 1794 Treaty thus confirmed that the Oneida's reservation lands were under federal protection and supervision. This Court has already characterized New York's attempt to tax Seneca lands protected in Article 3 as unlawful "interference with Indian possessory rights guaranteed by the Federal Government." *Oneida I*, 414 U.S. at 672. The same conclusion necessarily follows as to the Oneida lands similarly referenced in Article 2.

2. Despite this history, Sherrill makes two arguments that the lands at issue ceased to be Indian country in 1788. "Indian country" is defined by 18 U.S.C. § 1151 as:

> (a) *all land within the limits of any Indian reservation under the jurisdiction of the United States Government* . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, . . . including rights of way running through the same. [(Emphasis supplied).][5]

(contrary to the subsequent history of federal approval of such purchases). Finally, Sherrill fails to make the required showing that the Oneida would have understood the 1794 Treaty to abrogate the Nonintercourse Act.

[5] As this Court has explained, § 1151 "statutorily define[s] Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984). Section § 1151 is a criminal statute, but its definition is now utilized in most other

(a) Sherrill first argues that the Oneida reservation is not and never was an "Indian reservation under the jurisdiction of the United States" because the 1788 Treaty terminated the Oneida's aboriginal rights in those lands. Sherrill claims that in the 1788 Treaty, the Oneida sold the aboriginal rights of possession in *all* their lands to New York, which then ceded 300,000 acres back to the Oneida in some heretofore unknown state-law right of possession. From this, Sherrill concludes, the Oneida's aboriginal rights of possession were extinguished in 1788; the 1794 Treaty could not have created a federal reservation; and the lands reserved to the Oneida were never "Indian country" and thus never subject to the Nonintercourse Act. This argument reflects Sherrill's utter failure to understand the discovery doctrine, the principles governing treaty interpretation, and the Nonintercourse Act.

During the colonial period, tribes were recognized as sovereigns, governing their territories and in charge of their foreign relations with European powers. *Worcester*, 31 U.S. at 547. Under European law, however, a European power's "discovery" of aboriginal land limited tribal sovereignty in two respects: First the "discovering" state could lawfully prohibit a tribe within its realm from entering into treaties with rival powers. Second, and of vital importance here, the discovering power obtained the exclusive right to buy land from that tribe and thereby extinguish aboriginal title. *Id.* at 543-44.

Under the discovery doctrine, the tribe retained control over "internal and social relations, and [was] not brought under the laws of the Union or the state within whose limits they resided." *United States* v. *Kagama*, 118 U.S. 375, 382 (1886). The tribe also maintained its existing rights of use and occupancy, known as Indian or aboriginal title, subject only to the sovereign's exclusive right to extinguish those rights by purchase. *Worcester*, 31 U.S. at 544; see also

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contexts. *See Okla. Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993).



*Oneida II*, 470 U.S. at 235-36. This rule kept peace among colonial powers and the tribes, prevented conflict about land title, and gave the sovereign monopoly power over the land market. See generally *Cohen Handbook* at 50-62.

In the original 13 colonies, the discovery doctrine gave the British Crown the exclusive right to acquire Indian lands and to extinguish aboriginal title. *Johnson*, 21 U.S. at 587 ("the power [of discovery and purchase] now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees").[6] When the United States declared independence, the rights to restrain alienation and to extinguish title passed to the colonies. *Oneida I*, 414 U.S. at 667. The Articles of Confederation, however, were unclear about whether, and the extent to which, the states or the United States had succeeded to the Crown's discovery rights. See R. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1098-47 (1995) (legal history of federal-state conflict during this period); cf. *Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1152-61 (2d Cir. 1988) (New York had the power to purchase tribal land *prior* to the effective date of the Constitution). New York and other colonies took the position that they had inherited some of the powers of the British Crown with respect to tribes within their boundaries. It was as purported successor to the British Crown that New York entered into the 1788 Treaty, purchased most of the Oneida lands, and recognized the Oneida's "reservation" of 300,000 acres "forever." Pet. App. A136-37.

Experience under the Articles demonstrated to the Constitutional Convention of 1787 that exclusive federal control over Indian policy, including land policy, was necessary. Separate states' actions routinely created serious

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[6] *See also Worcester*, 31 U.S. at 548 (describing Royal Proclamation of Oct. 7, 1763 (forbidding white settlement west of the crest of the Appalachian Mountains and requiring imperial approval prior to the issuance of patents to Indian lands lying east of that line)).

conflicts and threats of wars with powerful tribes. See 33 J. Cont. Cong. 455-63 (Aug. 3, 1787). With relatively little debate, accordingly, the Constitution gave the federal government exclusive power over Indian affairs. See J. Madison, *Journal of the Federal Convention* 654-56 (E. Scott ed. 1898); *Worcester*, 31 U.S. at 559 ("[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians"); *Blackfeet*, 471 U.S. at 764 ("[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes").[7]

Promptly in 1790, the First Congress enacted the Nonintercourse Act, which codified the discovery doctrine's restraint on alienation absent sovereign consent by providing:

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of pre-emption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States. [Ch. 33, § 3, 1 Stat. at 138 (emphasis supplied).][8]

As George Washington explained to the New York Senecas, the Nonintercourse Act "is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States." See *American State Papers: Indian Affairs* No. 23, at 142 (1832).

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[7] *See also The Federalist No. 42*, at 268 (Madison) (C. Rossiter ed., 1961) ("[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory").

[8] The 1790 Act was reenacted with only minor modifications in 1793, 1796, 1799, and 1802. In 1834, the general restraint on individual Indian sales was removed, *see* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730-31 (codified as amended in part at 25 U.S.C. § 177).



The Nonintercourse Act gave the federal government exclusive authority with respect to *all* Indians lands, including those in the original 13 colonies:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians was in the State. But this reality did not alter the doctrine that *federal law, treaties and statutes protected Indian occupancy and that its termination was exclusively the province of federal law*. [*Oneida I*, 414 U.S. at 670 (footnote and citation omitted) (emphasis supplied).][9]

In sum, the Constitution and the Nonintercourse Act "explicitly extinguished whatever claims the states might previously have had to exercise power over Indian land transactions and explicitly federalized the regulation of Indian land cessions." R. Clinton & M. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 88 (1979).[10]

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[9] *Amici* Counties incorrectly cite *New Jersey* v. *Wilson*, 11 U.S. (7 Cranch) 164 (1812), for the proposition that the Nonintercourse Act did not apply to Indian lands within states. Brief *Amicus Curiae* of Madison & Oneida Counties at 14. No Indian was a party in *Wilson*, and the decision did not involve or address the validity of a tribal conveyance, reservation status, or any tribal possessory rights. This Court simply upheld a Contract Clause claim against New Jersey brought by non-Indian purchasers of land as to which the State had promised tax immunity. 11 U.S. at 165-67.

[10] The exclusive federal power over tribal relations and the federal statutory restraints on alienation also created a trust or fiduciary responsibility in the United States with respect to the tribes and tribal land. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet. ) 1, 17 (1831); *Seminole*

As noted, the 1788 Treaty was signed during the period governed by the Articles of Confederation (though after New York had signed the Constitution and the required nine states had established it). New York was acting as one of the successors to the discovering sovereign (the Crown) when it entered into that Treaty. In that capacity, New York acquired most of the Oneida lands, while the Oneida "reserved" 300,000 acres "forever." Thus, New York exercised its purported right to purchase most of the Oneida's land, while simultaneously recognizing the Oneida's aboriginal rights in the reserved tracts of land. The Treaty constituted a routine exercise of a "discovering" sovereign's right to purchase certain lands while "reserving" other lands to the Oneida in fulfillment of the sovereign's trust obligation with respect to the Tribe's aboriginal rights of possession. See also *Worcester*, 31 U.S. at 552.

The text of the 1788 Treaty leaves no doubt as to its proper construction. It dispositively states that the Oneida "reserved" lands "forever" – language that, in this setting, has an established meaning. The word reservation originally meant "land reserved from an Indian cession to the federal government regardless of the form of tenure." See *Cohen Handbook*, at 34. When the term is used as an aid to judicial construction, it denotes rights reserved from a cession made by the Indians to the government, rather than rights granted to the Indians by the government. See *Winans*, 198 U.S. at 381 ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted. *And the form of the instrument and its language was adapted to that purpose*") (emphasis supplied). As Professor Cohen explains,

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*Nation* v. *United States*, 316 U.S. 286, 296-97 (1942). And, it is the trust responsibility which, in turn, gave rise to the canons of construction requiring that an agreement between a discovering sovereign (or its successor) and a tribe must be construed as the tribe would have understood it. *See Mille Lacs*, 526 U.S. at 196.



> "Indian reservations" acquired their name from the fact that when Indians ceded land, they commonly made "reservations" of land to be retained in Indian ownership. This practice goes back at least to 1640, when Uncas, the Mohican chief, deeded a large area to the Colony of Connecticut, out of which he carved a reservation for himself and his tribe." [*Original Indian Title*, *supra*, at 35 n.17 (citing 1 Trumbull, *History of Connecticut* 117 (1818)).][11]

Sherrill's reading of the 1788 Treaty would give the State greater rights than the United States would have had upon entering into the same Treaty. This extraordinary, counter-historical interpretation should be rejected.

Sherrill's reading of the Treaty is doomed not only because it contravenes the ordinary usage of "reservation," but also because it is utterly inconsistent with any understanding the Oneida would have had. *Worcester*, 31 U.S. at 552, is directly on point. There, the Court interpreted a treaty "allott[ing]" Cherokee territory. Georgia argued that "allotted" meant land given to the Cherokee by the United States while "marked out" meant land demarcated as between sovereigns. Rejecting this technical argument, the Court said it was not "reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out.'" *Id.* See *id.* at 582 (M'Lean, J., concurring) ("[h]ow the words of the

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[11] *See also United States* v. *Alcea Band of Tilanooks*, 329 U.S. 40, 52 (1946) (whether a tract of land "was properly called a reservation . . . or unceded Indian country . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent") (omissions in original); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 390 (1902) ("[I]n order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.").

treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction").

Even if the 1788 Treaty could be read to have created some new state-law right of possession, the Constitution and the Nonintercourse Act placed disposition of that right under exclusive federal control. Indeed, the Act flatly prohibited any "sale of lands" by Indians without federal authorization, including sales to states "having the right of pre-emption to such lands." Ch. 33, § 4, 1 Stat. at 138. "The federal restraints on alienation and exclusive control over the extinguishment of Indian title constitute federal regulatory action under the Indian Commerce Clause; *they do not result from either federal claims to an interest in land owned by tribes or the tenure by which the tribal land is held.*" *Cohen Handbook* at 514-15 (emphasis supplied). New York's continuing purchases of Oneida lands after adoption of the Constitution violated the Nonintercourse Act, and failed to extinguish the treaty-recognized aboriginal rights in the lands.

(b) Sherrill's second argument is that even assuming the Oneida parcels are in a federal reservation, they are not "Indian country." Sherrill maintains that *Venetie* crafted a new test to assess whether a reservation is Indian country, requiring that the federal government not only set aside, but also engage in active, continuous administrative superintendence of, reservation lands. This argument is plainly wrong.

"Indian country" has always included reservations set aside by federal treaties. See *Venetie*, 522 U.S. at 528 n.3 ("[w]e ha[ve] also held, not surprisingly, that Indian reservations [a]re Indian country"). *Venetie* does not remotely suggest that a court, when considering such reservation lands, must separately assess whether the government has subjected those same lands to continuous administrative supervision. Nor do this Court's earlier precedents. The leading case is *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913), where this Court – without any reference to the need for a continuous



superintendence inquiry – firmly declared that "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land that . . . is lawfully set apart as an Indian reservation," whether originally occupied by the tribe or set aside from the public domain. The federal government ultimately possesses the authority to enact laws governing Indian reservations; and this Court has, accordingly, deemed reservation lands to fall under federal superintendence by definition. See *Venetie*, 522 U.S. at 529 ("[in *United States* v. *McGowan*, 302 U.S. 535, 539 (1938)], [w]e reasoned that, *like Indian reservations generally*, the [non-reservation Indian] colony had been '"'validly set apart for the use of the Indians . . . under the superintendence of the Government'"'") (omission in original) (emphasis supplied).

In contrast, *Venetie* considered lands governed by the Alaska Native Claims Settlement Act ("ANCSA"). As the Court detailed, ANCSA expressly *revoked all reservations* in Alaska (except one) and extinguished all aboriginal claims to land in the State, and conveyed land in fee simple to state-chartered Alaska Native corporations. Because ANCSA expressly terminated the Alaska lands' reservation status (§ 1151(a)) and because the lands had not been taken into federal trust (§ 1151(c)), the Court considered only whether the lands fell within the third distinct category of Indian country lands – whether the lands were "'dependent Indian communities.'" *Id.* at 527. In answering "no," the Court considered it critical that the lands were freely alienable and could be used for non-Indian purposes, and found that ANCSA expressly terminated federal superintendence of the land at issue. Finally, the Court concluded that an express goal of ANCSA was to avoid "'a lengthy wardship or trusteeship,'" severely "undercut[ting]" any finding of federal superintendence. *Id.* at 533-34. Nothing in *Venetie*, which addresses the "dependent Indian community" definition, suggests that a federal *reservation* is not "Indian country" under federal law.

The 1788 Treaty reserved Oneida lands; that reservation shortly thereafter became subject to federal authority. It is "Indian country" as matter of federal law.

### B. The Reacquired Lands Are Not Alienable And, In Any Event, Congress Has Not Authorized State And Local Taxation.

Sherrill and its *amici* try desperately to force this case into the procrustean bed of *Yakima* and *Cass County,* which they read to say that alienable land in Indian country is taxable. They argue that even though the Oneida lands were unlawfully alienated, the Oneida's reacquisition does not bring the restrictions on alienability back into effect, and the Oneida must petition the United States for trust status under 25 U.S.C. § 465, to reinstate their lands' tax-immune status.

*Yakima* and *Cass County*, however, arose in the distinct historic context of the allotment era statutes – federal laws *authorizing* the transfer of Indian lands and expressly allowing the imposition of state and local taxes. Here, in marked contrast, the initial transfer of land from the Oneida violated federal law. And, Congress has never authorized state and local taxation of tribal lands within this reservation.

Under the Constitution, absent some exercise of federal authority, tribes retain sovereignty over their members and lands and aboriginal title. See *Cherokee Nation*, 30 U.S. at 16 (a tribe is a "distinct political society, separated from others, capable of managing its own affairs and governing itself"). Thus, once the Constitution was enacted, states ceased to have jurisdiction vis-à-vis tribes and tribal lands, which were immune from state laws unless otherwise provided by Congress. See *Cohen Handbook* at 388; *Worcester*, 31 U.S. at 556-57.[12] "The policy of leaving Indians free from state

[12] Indeed, in addressing apportionment of population among the States for purposes of representation in the House of Representatives and federal taxation, the Constitution expressly excludes "Indians not taxed," U.S. Const. art. I, § 2, ch. 3, "an accurate description of the status of [tribal] Indians in 1789," a time "when Indians were not subject to any ordinary laws save those of their tribes," *Cohen Handbook* at 388, 389.



jurisdiction is deeply rooted in the Nation's history." *Rice* v. *Olsen*, 324 U.S. 786, 789 (1945).

The general rule of federal preemption of state property taxes on tribal land operated without difficulty during the initial federal Indian eras of isolation and removal. In the late 19th century, however, Congress "retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *Yankton Sioux*, 522 U.S. at 335. Through the General Allotment Act of 1887 ("GAA") and other allotment statutes, Congress allotted reservation lands to individual Indians and opened "surplus" land to non-Indian homesteading. *Id.* at 335-36 (ch. 119, 24 Stat. 388). Allotted land under the GAA could not be taxed until the restrictions on its sale were lifted; but a 1906 amendment to the GAA permitted the Secretary of the Interior to eliminate such restrictions and to issue a fee patent at which time "all restrictions as to . . . taxation of said land shall be removed." Ch. 2348, 34 Stat. 182, 183 (codified at 25 U.S.C. § 349). Similar provisions were enacted with respect to many other allotments. See *Cohen Handbook* at 410-11 nn.54, 55 (citing statutes). Massive quantities of allotted land were lost.

Relevant here, the GAA and other allotment acts were deemed *expressly* to authorize state and local taxation of allotted land after restrictions on its sale were lifted. See GAA § 6, 25 U.S.C. § 349 (state laws apply to allottees who receive a fee patent to land); *Goudy* v. *Meath*, 203 U.S. 146 (1906) (relying on § 6 to uphold state taxation of allotted Indian land in a reservation when federal restrictions expired).

Congress "formally repudiated" the allotment policy by passing the Indian Reorganization Act of 1934, see *Yankton Sioux*, 522 U.S. at 339, which provided that no further allotment of tribal land should take place and sought to

encourage tribal self-determination. Ch. 576, § 4, 48 Stat. 984, 985 (codified as amended at 25 U.S.C. § 464). That Act, however, simply stanched the tribes' hemorrhaging of lands. When Congress reversed course, tribes had already lost ownership of vast lands which were no longer tax exempt. *Yakima* and *Cass County* arose in this context.

In *Yakima*, the County sought to tax lands owned by individual tribal members pursuant to the GAA. The Court found in the GAA (as amended by the Burke Act) a clear congressional intent to allow taxation of allotted lands after they became fully alienable. Put differently, once the lands became freely alienable, the landowners, though tribal members, no longer held the land in federal trust, but rather as any non-Indian landholders would.

The circumstances presented here are not remotely analogous. In *Yakima*, the Court addressed the consequences of transactions authorized – indeed, required – by federal statute. Here, the Court addresses the consequences of transactions *forbidden* by federal law. Under *Yakima*, the Court found that Congress expressly made the allotted lands taxable and that the tribe's reacquisition of such land, even in Indian country, did not automatically repeal the statute and reconfer a tax exemption. Congress *never* authorized taxation of tribal lands in the Oneida reservation. Indian title to the parcels at issue was never quieted; they are tribal lands which are *not* freely alienable under the plain text of the Nonintercourse Act. See 25 U.S.C. § 177. See also 25 C.F.R. § 152.22(b) (trust lands, restricted lands, "and any other land owned by an Indian tribe may only be conveyed where specific statutory authority exists").

*Cass County* is likewise inapposite. There, this Court construed the Nelson Act of 1889, which implemented the allotment policy for the Chippewa Tribes of Minnesota. It required the Chipppewa to cede title to land in the state; the United States then either allotted lands to tribal members as under the GAA, sold the lands as pine lands to the highest



bidder, or sold the land as "surplus" to non-Indians under the Homestead Act. In the 1980s, half a century after congressional repudiation of allotment, the Leech Lake Band repurchased fee land within its reservation. Cass County assessed property taxes against the reacquired parcels.

The Court found that the County could tax the Tribe's reacquired lands. The Nelson Act reflected an "unmistakably clear" congressional intent to authorize taxation because it terminated the Indian right of possession and made the lands freely alienable. 524 U.S. at 113-14. Thus, like *Yakima*, *Cass County* fundamentally turned on a congressional authorization of the initial alienation and a clearly-expressed congressional intent to permit taxation of lands after they had become freely alienable. Neither circumstance obtains here. And, *Cass County* reaffirms the longstanding principle of tribal lands' tax immunity absent clear congressional action.

Sherrill misuses cases arising out of the federal allotment *statutes* to justify taxation of lands lost to the Tribe through *unlawful transactions*. Tribal reacquisition remedies *illegal* transactions, and reactivates the lands' tax exemption and the Nonintercourse Act's restrictions on alienability.

### C. The Oneida Reservation Was Never Diminished Or Disestablished.

A necessary consequence of the exclusive federal authority over the alienation of tribal lands and the resultant federal trust obligation is that "only Congress" can disestablish or diminish a reservation. *Solem*, 465 U.S. at 470. Neither a state, cf. *Oneida II*, 470 U.S. at 234, nor private individuals, see *United States* v. *Celestine*, 215 U.S. 278, 286-87 (1909), can alter the status of reservation lands. "Once a block of land is set aside for an Indian reservation *and no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470 (emphasis supplied).

This Court has never permitted *de facto* diminishment or disestablishment of a reservation. To the contrary, in light of the federal trust obligation, diminishment or disestablishment requires a "'clear and plain'" congressional act. *Yankton Sioux*, 522 U.S. at 343 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-39 (1986)).[13] The standard is particularly high for a reservation guaranteed and allegedly abrogated by federal treaty, because Congress's intention to abrogate a treaty must be "clearly express[ed]," *Mille Lacs*, 526 U.S. at 202, and because a treaty must be interpreted not simply with respect to Congress's intent, but as "the Indians themselves would have understood [it]," *id.* at 196.[14]

In support of its argument that the Oneida reservation was disestablished, Sherrill cites only the 1838 Treaty of Buffalo Creek – not an act of Congress but a bilateral treaty – in which, *inter alia*, the Oneida exchanged lands in Wisconsin for lands in Kansas. This Treaty does not in any way, let alone clearly, reflect an agreement to disestablish the Oneida's New York reservation. The Oneida's assent was obtained only *after* a federal agent explicitly explained that the Treaty allowed them to "remain where they are forever." JA 146. And, the Oneida did not, in fact, leave the land.

To determine whether Congress has clearly diminished or disestablished a reservation through unilateral legislation, this Court considers three factors – the text of the statute, the

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[13] *See, e.g.*, *Yankton Sioux*, 522 U.S. at 357-58 (1894 surplus land act); *Hagen* v. *Utah*, 510 U.S. 399, 407 (1994) (1905 Proclamation effectuating 1902 Act); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 598 (1977) (1904 surplus land act); *DeCoteau* v. *Dist. County Court*, 420 U.S. 425, 445 (1975) (1891 surplus land act); *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 357 (1941) (1883 act creating reservation at tribe's request diminished old reservation).

[14] Although no "particular form of words" is required, the statutory or treaty language must be clear, *Hagen*, 510 U.S. at 411 (citing *Solem*, 465 U.S. at 475); and ambiguities in the language are resolved in favor of continued reservation status. *See South Dakota* v. *Bourland*, 508 U.S. 679, 687 (1993).



surrounding circumstances or historical context, and the interpretive knowledge that can be gained from transactions following the federal act. See *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470-71. Even when transported wholesale to the context of a bilateral treaty, none of these factors supports diminishment or disestablishment here.

Sherrill sees the Buffalo Creek Treaty as a mandatory removal treaty vis-à-vis the Oneida, but that interpretation finds no support in the text – the "most probative evidence of diminishment," *Hagen*, 510 U.S. at 411 – and is directly refuted by a federal agent's contemporaneous explanation of the Treaty's terms. The Treaty contains no language that can be construed as a cession of Oneida lands in New York, see Pet. App. A147-48. It ceded the *Wisconsin lands* of the New York Indians and provided for the removal of the New York Indians "[i]n consideration of [that] cession and relinquishment." *Id.* at A149. In Article 13 addressing the Oneida, the Treaty makes removal conditional, occurring only upon the "mak[ing] of satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.* at A155. Moreover, the Treaty expressly contemplated that the Oneida and some other New York tribes might *not* remove, providing that:

> such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may . . . appoint, shall forfeit all interest in the lands so set apart, to the United States. [*Id.* at A150.]

This is a far cry from clear evidence of an agreement to disestablish the reservation.

Dispositively, moreover, before the Oneida assented to the Treaty, federal Commissioner Ransom Gillet explained its meaning, as reflected in a document provided and explained to the Oneida chiefs and then submitted to the Senate with the

Treaty: "the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York . . . unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. . . . [t]hey will not be compelled to sell or remove." JA 146. This is plainly the meaning of the text that would have been understood by the Oneida. See *Washington* v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (treaties are construed "'not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians'" (quoting *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899))).

The Court has found clarity and disestablishment in congressional *acts* explicitly forfeiting tribal authority over lands.[15] But when Congress merely expresses an intent to open a reservation to settlement in the future, that is insufficient to disestablish a reservation. For example, *Solem* distinguished a direction to "'sell and dispose' of" unallotted reservation land from the immediate "language of cession" that clearly diminishes a reservation. 465 U.S. at 473; see also *Mattz* v. *Arnett*, 412 U.S. 481, 495-96 (1973) (a declaration that lands are "'subject to settlement, entry, and purchase'" is insufficient to disestablish). In *Santa Fe*, 314 U.S. at 354-55, Congress created a new reservation for the Walapai to induce removal, but the Walapai "did not accept the offer which Congress had tendered." *Id.* at 354.

[15] *See Rosebud Sioux*, 430 U.S. at 597 (the tribe does "'hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to'" the unallotted lands of their reservations) (quoting 33 Stat. 256); *DeCoteau*, 420 U.S. at 445 (the tribe would "'cede, sell, relinquish, and convey'" its unallotted lands to the United States) (quoting 26 Stat. 1036); *Or. Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 768 (1985) (recognizing similar cession language as being a "broad and unequivocal conveyance of the Tribe's title to the land"); *Hagen*, 510 U.S. at 407-08 (tribal lands will "be restored to the public domain . . . . [and] opened to entry, settlement, and disposition") (internal quotation marks omitted) (quoting 34 Stat. 3119-20).



Congress's intent that the Walapai remove did *not* disestablish the Tribe's reserved lands; tribal rights in those lands terminated only many years later after the Tribe unequivocally accepted the new reservation and agreed to remove. *Id.* at 358. Similarly, Congress's expressed desire that the Oneida remove in the future did not affirmatively disestablish their reservation, as the solemn assurances made by the government's negotiator amply confirm.[16]

The Treaty's historical context does not provide the "unequivocal evidence" missing from the text. See *Yankton Sioux*, 522 U.S. at 351. The Treaty effected the New York tribes' exchange of their lands in Wisconsin for lands in Indian Territory (now Kansas), but the United States had varying success in convincing the affected tribes to remove. The Seneca and Tuscarora nations agreed to remove within five years (agreements that were later reversed). The Cayuga and Onondaga were promised money if they removed, but did not agree to do so. Pet App. A153-54. The St. Regis Mohawks secured a supplement to the treaty providing that "the Government shall not compel them to remove." 7 Stat. 561, 561 (1838). As noted, the Oneida made only a conditional agreement and ultimately did not remove.

In reality, Sherrill and its *amici* rely heavily, indeed virtually exclusively, on the third, and "least compelling" factor (*Yankton Sioux*, 522 U.S. at 356) used to determine diminishment or disestablishment – land transactions after the Treaty. But they ignore that this evidence is only an aid to *interpretation of the federal treaty or statute* – and is "an unorthodox and potentially unreliable method of . . .

[16] Sherrill incorrectly claims that "[t]his Court has recently recognized that an agreement to remove 'as soon as' an expected imminent event occurs is a present agreement to remove." Pet.'s Br. 35. A footnote in *Mille Lacs* listed removal treaties executed in 1837, including a treaty with the Saganaw Chippewa in which the tribe ceded over 100,000 acres to the United States. *See* 526 U.S. at 190 n.4. This cession, not the phrase "as soon as," made the Saganaw Chippewa treaty a "removal treaty."

interpretation" at that. *Solem*, 465 U.S. at 472 n.13. This Court has *never* found *de facto* disestablishment based solely upon demographic patterns. Here, where the Treaty and the negotiating history belie any claim of disestablishment, these patterns have no place in the analysis.[17]

Moreover, Sherrill is not relying on demographic changes resulting from the implementation of a Treaty. Instead, Sherrill relies on sales that *preceded* and *followed* the Treaty and *violated the Nonintercourse Act*. Sherrill's real argument is that the 1838 Treaty somehow ratified illegal sales that took place before its negotiation (including sales of the parcels here) and authorized future illegal sales. This Court has already rejected this kind of *post hoc* ratification argument absent express language of ratification. See *Oneida II*, 470 U.S. 246-48 & n.19. The Treaty text cannot bear this weight.

In any event, this Court has discussed demographics only in the context of allotment acts approving land sales. *Illegal* land sales before and after a treaty are neither relevant nor probative. Put differently, the argument that illegal sales of Oneida lands can diminish or disestablish a federal reservation turns federal supremacy into a charade.[18] The Treaty of Buffalo Creek does not reflect any "clear and plain" intent to diminish or disestablish the Oneida reservation.

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[17] *See, e.g., Yankton Sioux*, 522 U.S. at 356-57 (subsequent demographics "reinforce[d] our holding" that surplus land act diminished reservation); *Hagen*, 510 U.S. at 420 (subsequent demographics did "not controvert[]" finding that surplus land act diminished reservation).

[18] *Amici*'s arguments that the United States acquiesced in state and local jurisdiction over Oneida lands after they were illegally alienated and that the Oneida abandoned their lands are not relevant to the disestablishment question. Neither passive acquiescence nor abandonment after an illegal sale can stand in for a treaty clearly expressing the parties' agreement to disestablish. And, even if third-party possession of lost lands might limit a tribe's right to possession, *see United States* v. *Creek Nation*, 295 U.S. 103, 110-11 (1935), this Court has never suggested that such circumstances limit tribal sovereignty if the tribe in fact obtains possession by purchasing the lands from the non-Indian third party.



## II. A FINDING THAT THE TRIBAL LANDS AT ISSUE ARE IN INDIAN COUNTRY WILL NOT HAVE THE APOCALYPTIC CONSEQUENCES SHERRILL AND ITS *AMICI* PREDICT.

Sherrill and its *amici* claim, in vastly overblown terms, that an adverse decision in this case will yield dire consequences. Their arguments are entirely misplaced.

*First,* Sherrill and its *amici* address their arguments to the wrong audience. This Court has repeatedly held that "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943); see also *N.W. Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945). This rule is often invoked in situations where the equities would otherwise weigh in favor of revising a treaty to benefit a tribe. Fidelity to treaty terms is at least as important where those terms support the tribal position, as do the terms of the 1788, 1794, and 1838 Treaties. Indeed, this Court has already accepted "the potential consequences" of its decision in *Oneida II*. See 470 U.S. at 253.

As noted above, other States that violated the Nonintercourse Act fashioned congressionally-approved settlements with affected tribes. The policy issues arising from the taxation of land are appropriately addressed through such settlements. Sherrill's true complaint lies with New York for its failure to negotiate such an agreement.

*Second,* Sherrill and its *amici* seek to obscure that the questions presented concern whether Sherrill may circumvent the traditional *tax-immune status* of *tribally-owned* lands in a reservation. This case has no relevance to whether the Tribe may tax or otherwise regulate reservation lands *that it does not own*, *i.e.*, almost all of the Oneida reservation. This Court has sharply limited the ability of tribes to exercise such jurisdiction. See *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001); *Montana* v. *United States*, 450 U.S. 544 (1981).

*Third*, the impact that a reaffirmation of longstanding principles of tribal tax immunity would have on New York and its subdivisions is vastly exaggerated. Numerous states and counties have within their borders non-taxable tribal land holdings that dwarf the amount of land realistically at issue here. But while New York and its subdivisions have submitted numerous briefs *amicus curiae* to the Court, no other governmental entity has supported petitioner, suggesting they do not suffer fiscal chaos as a result of the presence of tribal land and, indeed, often thrive through contributions made by Indian tribes to their economies. See Brief *Amicus Curiae* of Puyallup and Southern Ute Tribes, and Pueblo of Acoma.

Sherrill's assertions on this subject ring particularly hollow. The Oneida Nation seeks to act fairly not only with respect to the third-party landowners from whom it purchased property, but also with regard to the counties and municipalities affected by those purchases. Accordingly, the Tribe operates a Silver Covenant Chain Grant program, providing direct grant monies to local governments and school districts based on the amount of tribal landholdings within their boundaries. See JA 216-19. In the case of county and municipal government units, those grant monies are equivalent to the taxes the Tribe would have paid on its landholdings absent its tax immunity. *Id.* at 216-17 In the case of the school districts, the Tribe pays twice to three times as much in grants as it would in taxes. *Id.* at 219. *Sherrill, however, has steadfastly refused to accept any grant monies from the Tribe.* See CA2 J.A. A-1587. Sherrill has elected to fight the Tribe rather than to cooperate with it, and should not be heard now to complain about the consequences of its own choice.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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(12)

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No. 03-855

IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

*Petitioner,*

*v.*

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## BRIEF OF *AMICUS CURIAE* STATE OF NEW YORK IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICUS CURIAE

This case presents a "serious question" left open by this Court's 1985 decision in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), *aff'g in part and rev'g in part*, 719 F.2d 525 (2d Cir. 1983), *aff'g and remanding*, 434 F. Supp. 527 (N.D.N.Y. 1977) ("*Oneida II*"): whether the Oneida Indian reservation in central New York State, which was created by a state treaty in 1788 and acknowledged by the United States in 1794, was later terminated or substantially diminished when the Oneidas remaining in the area in 1838 agreed in the Treaty of Buffalo Creek to remove from New York. Treaty of January 15, 1838, 7 Stat. 550 ("Buffalo Creek Treaty" or "Treaty"); *see Oneida II*, 470 U.S. at 269 n.24 (Stevens, J., dissenting). In the years shortly before and after the proclamation of the Treaty, most of the New York Oneidas sold nearly all their lands to New York and left the State, and today the region is over 99 percent non-Indian. Nevertheless, the Second Circuit held that several parcels recently acquired by the Oneida Indian Nation of New York (the "Nation") within the 1788 reservation boundaries are not subject to local real property taxation because the land remains "Indian country" under 18 U.S.C. § 1151(a). *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003) ("*Sherrill*").

At stake here is far more than the tax status of a few isolated parcels of land. The Second Circuit's conclusion imperils the tax and civil regulatory jurisdiction that the State has exercised over this 250,000-plus-acre area for more than 150 years. Under the reasoning of *Sherrill*, the Nation may remove any land within this region from the tax rolls of local governments simply by purchasing it, thereby threatening the local tax base and financial well-being of

communities in a two-county area. The Nation has already purchased, and purported to remove from the tax rolls, over 16,000 acres of land within the 1788 boundaries.

Additionally, because federal law restricts state regulatory authority over tribal land in Indian country, *Sherrill* creates a patchwork of tribal and state civil jurisdiction that jeopardizes the orderly and uniform application of law. As this Court has recognized, "when an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Hagen v. Utah*, 510 U.S. 399, 420-21 (1994) (citation and quotation omitted). Further, the Second Circuit disregarded the importance of the justifiable expectations of those who have lived in the area for generations. *See id.* at 421 (a finding that the reservation was not diminished "would seriously disrupt the justifiable expectations of the people living in the area"). In particular, the court ignored the practical consequences to the State and local governments, as well as to the residents of the area, of returning a non-Indian area that has long been governed by the State to Indian country status.

The effects of *Sherrill* have already extended beyond the Oneidas' historic lands. In *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004), the district court, citing *Sherrill*, enjoined a New York village from enforcing its zoning and land use laws on property acquired by the Cayugas for use as a gaming hall within the approximately 64,000-acre Cayuga land claim area in western New York. *See also Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, 03-CV-690



(N.D.N.Y.) (involving other property within the Cayuga land claim area). The State and its localities have a vital interest in continuing to assert their longstanding jurisdiction over these areas as well.[1]

## HISTORICAL BACKGROUND OF THE BUFFALO CREEK TREATY

The historical context of the Buffalo Creek Treaty, as well as its terms and its aftermath, makes clear why the Treaty disestablished or substantially diminished the Oneidas' claimed reservation. The Treaty itself is explicit about its background and purpose: it was the successful culmination of over 20 years of federal efforts to remove the New York Indians, including the Oneidas, from New York. Preamble, 7 Stat. at 550-51.

### A. A Principal Goal of Federal Removal Policy Was to Terminate Indian Sovereignty in the Eastern States.

During the early nineteenth century, the federal government adopted a policy of removing the Indian tribes from the eastern States to frontier regions not then populated by settlers. In 1825, President Monroe recommended to Congress the "removal of the Indian tribes from the lands which they now occupy within the limits of the several States . . . to the country lying westward and northward thereof." Message of January 27, 1825, II James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*,

1. The State's emphasis on the correct interpretation of the Treaty is not in derogation of the three other questions on which this Court granted certiorari. Nor does the State concede that the Oneidas had any valid land claim or other rights in the area before or after the proclamation of the Treaty, or that their purported successors in interest have any claim or rights today.

*1789-1897* (1899) ("*Messages of the Presidents*"), at 280. Four years later, President Jackson urged that Congress "set[] apart an ample district west of the Mississippi, and without the limits of any State or Territory now formed," to which the Indians should be encouraged to emigrate. First Annual Message (1829), *Messages of the Presidents*, at 442, 458. Jackson noted that one of the problems to be remedied by removal was the conflicting assertion of State and tribal sovereignty within existing state boundaries, especially in the south. Apparently believing that Indian sovereignty in New York had already ended, he asked rhetorically, "[w]ould the people of New York permit each remnant of the Six Nations within her borders to declare itself an independent people under the protection of the United States?" *Id.* at 457. Although Jackson stated that removal "should be voluntary," he emphasized that the Indians "should be distinctly informed that if they remain within the limits of the States they must be subject to their laws." *Id.* at 458-59.

Congress adopted the Indian Removal Act of 1830 in response to Jackson's proposal. Act of May 28, 1830, 4 Stat. 411 ("Removal Act"). The Removal Act authorized the President to set aside federal lands west of the Mississippi "for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there." Section 1, 4 Stat. at 411-12. The core purpose of federal removal policy was to "mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law* 79 (1982 ed.); *see also* Remarks of Sen. Frelinghuysen, 6 Reg. Deb. 309 (1830) ("the design of the system of which the present



bill forms but a part, is really to remove all the Indian tribes beyond the Mississippi, or, in case of their refusal, to subject them to State sovereignty and legislation").

### B. The Oneidas' Removal from New York Commenced More Than 20 Years Before the Proclamation of the Buffalo Creek Treaty.

In New York, the federal government actively encouraged and aided Indian removal. In 1815, the New York Indians sought the assistance and consent of the United States to their removal to the west. 7 Stat. at 550. In 1821 and 1822, the federal government assisted the Oneidas and other New York tribes in purchasing land in Wisconsin from the Menominee and Winnebago Tribes. *Id.*; *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 420 (1942 ed.). President Monroe approved both purchases (the first in full, the second in part). *See New York Indians v. United States*, 170 U.S. 1, 6-7 n.1, 14 (1898), *rev'g*, 30 Ct. Cl. 413 (1895), *after remand*, 40 Ct. Cl. 448 (1905). New York Indians recognized that the Wisconsin lands were intended to serve as a new homeland for Indians removing from New York. According to members of the Oneidas and other tribes,

> in the treaties of 1821 and 1822 it was originally the intention of the tribes . . . and the policy of this Government, to relieve the State of New York of its entire Indian population, and to provide for the Six Nations and their confederates a home in the vicinity of Green bay [sic], which should belong to them and their posterity forever.

Memorial of the Delegates from the Stockbridge, Munsee, Brothertown, Oneida and St. Regis, to the President of the United States, January 20, 1831, *printed in* Senate

Confidential Report on "A Treaty with the Menomonee [sic] Tribe of Indians," February 28, 1831, National Archives, M668 (Ratified Indian Treaties 1722-1869) ("1831 Senate Report"), R. 6, fr. 0336-0337.

The Menominees later disputed the validity of these land purchases. 7 Stat. at 550. To settle the matter, in 1831, the United States and the Menominees agreed to set aside approximately 500,000 acres in Wisconsin as a home for the Oneidas and the other New York Indians in exchange for a payment by the United States. Treaty of February 8, 1831, 7 Stat. 342; *see also New York Indians*, 170 U.S. at 11-14; Cohen (1942 ed.), *supra*, at 420. Representatives of the New York Indians, including Oneidas who had recently removed from New York, formally accepted and urged ratification of the Menominee treaty, agreeing that the Wisconsin acreage "contains a sufficient quantity of good land, favorably and advantageously situated, to answer all the wants of the New York Indians." Treaty of October 27, 1832, 7 Stat. 405, 409 App.

In furtherance of their removal to Wisconsin, the Oneidas, with federal encouragement, repeatedly sold land to New York in the fourteen years preceding the signing of the Buffalo Creek Treaty, and used proceeds to finance their emigration. *See* Letter of Secretary of War John C. Calhoun to Jasper Parrish, Sub-Agent of the Six Nations, April 15, 1822, VII W. Hemphill, ed., *The Papers of John C. Calhoun, 1822-1823* 43-44 (1973) (advising an Oneida faction that President Monroe believed that the Six Nations should voluntarily dispose of their New York lands and remove to Wisconsin).[2] The Removal Act debates reveal that Congress

2. *See Report of the Special Committee to Investigate the Indian Problem of the State of New York* (1889) ("*1889 New York Report*"), (Cont'd)



was aware of these transactions. *See* Remarks of Sen. Forsyth, 6 Reg. Deb. 337 (1830) ("[w]ithin a few months the Governor of New York has, under a law of the State, called together the Oneidas, and made a treaty with them"). By the time the Treaty was signed in 1838, there were nearly as many Oneidas in Wisconsin as in New York. 7 Stat. at 556 (Sch. A). The 620 Oneidas who remained in New York occupied only about 5,000 acres. *Id.*; *Sherrill*, 337 F.3d at 163.

However, as non-Indian settlement in Wisconsin increased during the 1830s, it became apparent that further removal to Wisconsin was no longer feasible. Cohen (1942 ed.), *supra*, at 420. The Buffalo Creek Treaty recited that President Van Buren was

> satisfied that various considerations have prevented those still residing in New York from removing to Green Bay [including] that many who were in favor of emigration, preferred to remove at once to the Indian territory, which they

(Cont'd)
at 287 (Treaty of August 26, 1824); at 291 (Treaty of February 13, 1829) (portion of sale proceeds to be used "for the support of a Teacher at Green Bay"); at 293 (Treaty of October 8, 1829) (portion of the sale proceeds to be paid when a majority of chiefs "signify . . . their readiness to remove to Green Bay"); at 296 (dated April 2, 1833, signifying readiness to remove); at 298 (Treaty of February 1, 1826) (sale proceeds payable when the Governor is satisfied that the Indians are about to remove to Green Bay); at 303 (Treaty of April 3, 1830) (portion of sale proceeds to be used to superintend Oneida emigration to Green Bay); at 305 (Treaty of February 26, 1834). The February 13, 1829 Treaty was signed on behalf of New York by then-Governor Martin Van Buren, who as President of the United States, subsequently proclaimed Buffalo Creek in 1840.

were fully persuaded was the only permanent and peaceable home for all the Indians.

7 Stat. at 550. Accordingly, the United States and the New York Indians entered negotiations to remove the Indians to lands in what is now Kansas, then part of the Indian territory. Cohen (1942 ed.), *supra*, at 420.

### C. The Oneidas Agreed to Remove from New York in the Buffalo Creek Treaty.

The Buffalo Creek Treaty recited that its purpose was to carry out "the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory," 7 Stat. at 551, and its terms expressly provided for the removal of the Oneidas from New York. In the treaty, the Oneidas and the other New York Indians ceded to the United States nearly all the lands previously granted them in Wisconsin (excluding a tract that became the present-day Oneida reservation in Wisconsin) and received a new 1,824,000-acre reservation in modern-day Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes. . . ." Arts. 1, 2, 7 Stat. at 551-52. The new reservation was to be the "future home" of, among others, the 620 "Oneidas . . . [then] residing in the State of New York." Art. 2, Sch. A, 7 Stat. at 551-52, 556. The Treaty emphasized that the new lands were being set aside for the New York Indians in conformity with the provisions of the Removal Act. Art 2, 7 Stat. at 551. Moreover, any of the Tribes that did not "accept and agree to remove to" their new lands within five years or at such other time prescribed by the President would "forfeit all interest" in the new western lands. Art. 3, 7 Stat at 552.



Other treaty provisions likewise reflect the Oneidas' agreement to remove by providing for the exercise of tribal sovereignty only in the west. The Treaty specified that the Oneidas could henceforth "establish their own form of government, appoint their own officers, and administer their own laws" on the Kansas lands designated as "their new homes." Art. 4, 7 Stat. at 552. The treaty's terms restricted the Oneidas' exercise of these powers of tribal sovereignty and jurisdiction to "said country," *i.e.*, the part of the new reservation where the "Oneidas [were] to have their lands in the Indian Territory." Arts. 4, 5, 7 Stat. at 552. The United States promised to "protect and defend" the New York Indians "in the peaceable possession and enjoyment of their new homes." Art. 4, 7 Stat. at 552.

Finally, continuing the prior pattern of Oneida land sales to the State, followed by removal, the Treaty provided for the disposition of the Oneidas' remaining lands in New York. Although New York, which held the right of preemption, was not a party, and thus did not directly acquire the Oneidas' lands by virtue of the Treaty itself, the Treaty provided that the Oneidas "hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. at 554.

**D. After Proclamation of the Treaty, Most Remaining Oneidas Left New York and the State and Local Governments Assumed Jurisdiction Over Their Former Lands.**

Following the proclamation of the Buffalo Creek Treaty in April, 1840, the Oneidas entered into several treaties with the State providing for the sale of most of their remaining land in New York. *New York Indians*, 40 Ct. Cl. at 469-71; *1889 New York Report*, at 309 (Treaty of June 19, 1840); at 329 (Treaty of June 19, 1840); at 343 (Treaty of March 13, 1841); at 356 (Treaty of May 23, 1842); at 363 (Treaty of February 25, 1846). Within a decade, the vast majority of the remaining Oneidas had left New York, although most did not remove to Kansas. Approximately 400 Oneidas removed from New York to Canada, and in 1846, about 150 removed to Wisconsin. *New York Indians*, 40 Ct. Cl. at 470. By 1905, of the Oneidas still in New York, about 150 were regarded as New York citizens, while approximately 128 resided on the Onondaga reservation and were not regarded as citizens. *Id.* By 1920, the Oneidas were down to 32 acres of tribal land. *United States v. Boylan*, 265 F. 165 (2d Cir. 1920), *error dismissed*, 257 U.S. 614 (1921).

Although few New York Indians removed to Kansas, in the late nineteenth century, the Oneidas and the other New York Indians successfully petitioned Congress for permission to bring an action to seek compensation for the Kansas lands, which during the intervening years had been opened to white settlement and sold by the United States. *See* Act of January 28, 1893, 27 Stat. 426. In explaining the 1893 legislation, Senator Platt, who reported the bill out of committee, made clear that the Indians' claim was grounded in the surrender of their New York lands at the time of



Buffalo Creek Treaty and before. *See* 24 Cong. Rec. 588 (1893) (referring to "the claim of the New York Indians to be compensated for certain lands which were given them in lieu of the lands which they had in New York"). Platt explained that the New York Indians had given up lands in New York and received lands in Wisconsin, which they then gave up in the Treaty for lands in Kansas. *Id.* He argued that although the New York Indians never went to Kansas, "they gave up the New York lands," but the United States never paid them "for the surrender of their lands in New York." *Id.* at 588-89.

This Court sustained the claim, holding that the agreement of the New York Indians to remove west was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in the Indian territory. *New York Indians*, 170 U.S. at 15. Additionally, citing Article 13 of the Buffalo Creek Treaty, this Court held that, notwithstanding the Oneidas' failure to occupy the new reservation, their agreement to remove "as soon as" they sold their remaining lands to the State was sufficient to avoid a forfeiture of the Kansas lands under the Treaty's stipulation that any of the tribes that did not timely "accept and agree to remove to" those lands would forfeit them. *Id.* at 26. The Oneidas, as well as other New York Indians, shared in the money judgment awarded by the Court. *See New York Indians*, 40 Ct. Cl. at 467, 471-72.

Following the Oneidas' departure, the State and its localities assumed jurisdiction over all the former Oneida lands within the 1788 boundaries, and this jurisdiction was unquestioned until the events giving rise to this action. The area has long since ceased to be recognized or treated

as a reservation by the federal government.[3] Moreover, the area has long since lost its Indian character, and for generations has been home almost exclusively to non-Indians. Census Bureau statistics for the year 2000 show that the area is populated almost entirely by non-Indians. *See* New York Quick Facts - Oneida County (Oneida County's non-Indian population made up 99.8 percent of the county's total population)[4]; New York Quick Facts - Madison County (Madison County's non-Indian population made up 99.5 percent of the county's total population).[5]

After examining this history of the Oneidas' removal from New York, the Indian Claims Commission ("ICC") found that the Oneidas sold the bulk of their land to New

3. As recently as 1997, the Department of Interior's Annual Report on Indian lands listed only 32 acres of land in Madison County and none in Oneida County as under BIA jurisdiction. Jt. App. (2d Cir.) 249-250. Federal government publications suggest that even those 32 acres are not characterized as "reservation" land. *See* U.S. Dept. of Commerce, *Federal and State Indian Reservations and Indian Trust Areas* 398-421 (1974) (listing Indian reservations in New York State but not listing a New York Oneida reservation). Instead, the "Oneida Nation of New York is classified as 'non-reservation, tax-exempt land,' and for that reason is not listed separately in this handbook." *Id.* at 407. *See also* Confederation of American Indians, *Indian Reservations - A State and Federal Handbook*, 194-205 (1986) (New York Oneida reservation not listed). In *Boylan*, the Second Circuit referred to the 32 acres as an "allotment." 265 F. at 173; *see* 18 U.S.C. § 1151(c) (Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished").

4. http://quickfacts.census.gov/qfd/states/36/36065.h (last visited July 13, 2004).

5. http://quickfacts.census.gov/qfd/states/36/36053.h (last visited July 13, 2004).



York State with the knowledge of the United States in a series of negotiated transactions beginning in 1795. *Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 375 (1978). The ICC also found that Article 13 of the Buffalo Creek Treaty constituted a federal authorization for the Oneidas to convey their remaining lands to the State. *Id.* at 385. Additionally, it concluded that in purchasing Oneida land, New York had been doing "what would otherwise have been the Government's job, *i.e.*, buying lands from the New York Indians in order to persuade them to move west. . . . In New York State the state was carrying out [the Federal Government's removal] policy. . . ." *Id.* at 405.[6]

## SUMMARY OF ARGUMENT

The Treaty of Buffalo Creek disestablished or nearly entirely diminished the Oneida reservation. It was designed "to release the Eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites," *New York Indians*, 30 Ct. Cl. at 450, and thereby to end the very types of jurisdictional conflicts involved here. The Treaty continued the removal of the New York Oneidas that had begun more than 20 years earlier with the knowledge and encouragement of the United States. The Oneidas and the other New York Indians agreed in the

6. Although two district court decisions held that the Buffalo Creek Treaty did not retroactively ratify prior land purchases by the State so as to extinguish any causes of action for violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, these cases did not address the issue of whether the Treaty prospectively terminated reservation status. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485, 492-93 (N.D.N.Y. 1990), *appeal pending* (2d Cir.); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 539 (N.D.N.Y. 1977), *aff'd and remanded*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part and rev'd in part*, 470 U.S. 226 (1985).

Treaty to give up most of the Wisconsin lands that had been set aside for the removal of the New York Indians, and the Oneidas remaining in New York also agreed to remove from New York to a new reservation created for them by the United States in the Indian territory halfway across the continent. Following proclamation of the Treaty, the vast majority of the remaining Oneidas sold their lands and left New York. Although few Oneidas settled on the new reservation, they ultimately sought and accepted the value of their western lands following this Court's decision in *New York Indians*. By agreeing to remove from New York, by selling nearly all their lands to the State and leaving New York, and by accepting the new reservation, the Oneidas, with Congressional approval, released and relinquished all their tribal rights, including all tribal sovereignty, over their former New York lands. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 356-58 (1941).

## ARGUMENT

### I. The Terms of the Buffalo Creek Treaty, its Role in Effectuating Federal Removal Policy, and the Area's Subsequent Jurisdictional History Demonstrate That the Treaty Ended Oneida Sovereignty over the Former Reservation.

A consideration of the terms of the Buffalo Creek Treaty, its historical role in implementing federal Indian policy, and the area's subsequent treatment leads to one conclusion — the reservation has been disestablished or almost entirely diminished.

1. Like all federal Indian treaties, the Buffalo Creek Treaty must be interpreted in view of its historical context. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (this Court looks "beyond the written words to the larger context that frames" the treaty, including the history of the treaty, the negotiations and the practical construction adopted by the parties). In particular, the manner in which the Indians understood the terms of an agreement is a key guide in construing federal Indian treaties. *Id.* Of course, this Court "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to [the] tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citation and internal quote omitted); *see also Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice").

Because this Court has repeatedly faced the question of when a reservation has been disestablished and diminished in cases interpreting allotment-era surplus land acts, the principles articulated in those decisions are applicable in determining whether the Buffalo Creek Treaty disestablished or diminished the Oneidas' reservation. Under these cases, the critical inquiry is whether there is a "congressionally manifested intent" that reservation status end. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[o]ur touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose"); *Hagen*, 510 U.S. at 414 (reservation diminishment is evidenced by "congressional intent with respect to those lands inconsistent with the continuation of reservation status"). Although congressional intent to terminate or diminish a reservation must be "clear and plain," and this Court "resolve[s] any ambiguities in favor of the Indians, and . . . will not lightly find diminishment," the Court will not disregard clear expressions of intent to diminish

or terminate a reservation. *Yankton*, 522 U.S. at 343-44 (citations and quotations omitted); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 447 (1975). This Court gives primacy to congressional intent to diminish in the surplus land act cases even where the enactment merely ratifies an agreement previously negotiated with the Indians. *See Yankton*, 522 U.S. at 339 (statute ratified and incorporated agreement in its entirety); *DeCoteau*, 420 U.S. at 441 (same).

In the surplus land act cases, as in cases interpreting treaties, this Court does not limit its inquiry to the text alone. Also relevant are the historical context surrounding the act's passage, and the subsequent treatment, jurisdictional history, and settlement pattern of the area in question. *See Yankton*, 522 U.S. at 344; *Rosebud*, 430 U.S. at 587; *DeCoteau*, 420 U.S. at 442; *see also Hagen*, 510 U.S. at 412 ("our traditional approach to diminishment cases . . . requires us to examine all of the circumstances surrounding the opening of a reservation"). In evaluating the subsequent jurisdictional history, "the single most salient fact is the unquestioned actual assumption of state jurisdiction over the . . . lands." *Rosebud*, 430 U.S. at 603.

All of these factors indicate that Congress intended, and even under the most generous construction of the Buffalo Creek Treaty, the Oneidas must have understood, that their agreement to remove terminated their jurisdiction over the lands they no longer occupied in 1838; at most only the 5,000 acres that the Oneidas then occupied would retain reservation status, and then only until the Oneidas sold them and left. And in fact, within a decade after the Treaty's proclamation, nearly all the Oneidas had done so, relinquishing their jurisdiction over those lands as well.



2. The intent of both the United States and the Oneidas to disestablish or nearly entirely diminish the Oneidas' New York reservation is apparent from the terms of the Buffalo Creek Treaty. It documented the long history of federal efforts to remove the Indians, including the Oneidas, from New York, and stated that the removal agreed to in the Treaty was undertaken pursuant to the federal Removal Act. Additionally, in Article 13, the Oneidas agreed to remove "as soon as" they disposed of their remaining New York lands.

The Buffalo Creek Treaty is flatly inconsistent with continuing Oneida sovereignty in the area. The Oneidas' agreement to dispose of their New York lands and remove to a new "permanent home" in the Indian territory and to "establish their own form of government" and "administer their own laws" there, rather than on the New York lands from which they had just agreed to remove, superseded whatever rights the Oneidas may have had in the region under the 1794 Treaty of Canandaigua. Treaty of November 11, 1794, 7 Stat. 44.[7] Their agreement to remove "can by no means be reconciled with" the Nation's claim to jurisdiction over the area under the 1794 Treaty. *Yankton*, 522 U.S. at 345.

The Oneidas could not reasonably have expected to continue to exercise jurisdiction over lands they had already left and were now leaving. *See Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 458 (7th Cir. 1998) (Menominees "could not reasonably have expected to continue" to exercise

7. Article II of the 1794 Treaty expressly contemplated that the Oneidas might one day sell their lands, providing that "the said reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. at 45.

hunting and fishing rights retained in 1831 treaty following an 1848 treaty in which they agreed to leave Wisconsin and move to a new reservation 300 miles away), *cert. denied*, 526 U.S. 1066 (1999). And it is inconceivable that the United States intended to terminate Oneida sovereignty over the 5,000 acres the Oneidas then occupied and remove them half a continent away while simultaneously preserving their sovereignty over a quarter of a million acres of land that the United States had encouraged them to sell to New York and that they no longer even occupied in 1838. These lands not only had been claimed by the white settlers who had moved into the area by 1838, but had been sold by the Oneidas themselves for disposition to those settlers. Thus, Congress's approval of the Oneidas' agreement to sell their remaining lands and remove from New York reflected its recognition of the *de facto* diminishment that had already occurred. *See Solem v. Bartlett*, 465 U.S. 463, 471 (1984) (citations omitted).

3. This interpretation is confirmed by the Treaty's broader historical context. The Oneidas' agreement to remove from New York to a new home in the middle of the American continent was the culmination of a removal process that had begun more than 20 years earlier with the participation and encouragement of the federal government. By 1838, nearly half of the New York Oneidas had removed to Wisconsin, and the New York Oneidas occupied only about 5,000 acres within the 1788 boundaries. Both the Indians and the United States acknowledged that this process was designed to remove the Indians, including the Oneidas, from New York State to a remote part of the western frontier where they would be far from advancing white settlements. *See* 1831 Senate Report, R. 6 at fr. 0336-0337. During the two decades leading up to the Buffalo Creek Treaty, the frontier continued to move westward; the Indians' new home



was initially to be in Wisconsin, and then in the Indian territory west of the Mississippi. But the goal of removing the Indians from New York remained constant. Moreover, the federal removal policy's goal of avoiding conflicts of state and tribal sovereignty could be accomplished only if Oneida sovereignty over the area they no longer occupied, and the area from which they were to remove, was ended.

"In view of this historical setting, it cannot now be fairly implied that tribal rights of the [Indians] in lands outside the [new] reservation were preserved." *Santa Fe*, 314 U.S. at 358. Contrary to what the Second Circuit believed, the "central bargain" of Buffalo Creek was not simply the Indians' exchange of their Wisconsin lands for new lands west of the Mississippi. *See Sherrill*, 337 F.3d at 160; *see also id.* at 164 (the land exchange was the "rationale for the award" to the New York Oneidas and others in *New York Indians*). The Second Circuit failed to recognize that the Wisconsin lands and the Oneidas' New York lands were inextricably linked because the Wisconsin lands had been set aside for the removal of all New York Indians. Indeed, in 1832, New York Indians, including Oneidas who had recently removed, accepted the United States' treaty with the Menominees regarding this land, agreeing that the Wisconsin lands were sufficient for "all" the "wants" of the New York Indians. Treaty of October 27, 1832, 7 Stat. 405, 409 App; *see also* Brief of Amicus Curiae United States at 30, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (No. 83-1065). The Oneidas' surrender in the Buffalo Creek Treaty of most of the Wisconsin lands provided to them in the Menominee treaty was simply another step in their ongoing removal from New York. As Senator Platt recognized decades later in explaining why

the Indians should be allowed to sue the United States for the value of the western reservation they had never occupied, the Kansas lands were given to the Indians in lieu of their New York lands. *See* 24 Cong. Rec. 588-89 (1893).

4. Finally, the treatment of the area within the 1788 boundaries following the Treaty's proclamation strongly supports the view that both Congress and the Oneidas understood that the Treaty would terminate Oneida sovereignty in New York. After 1840, the remaining Oneidas sold virtually all of their remaining lands, and most left New York. For over a century and a half, state and local governments have exercised jurisdiction over nearly all the lands within the 1788 boundaries, and these lands have been populated almost exclusively by non-Indians. The Second Circuit's cavalier dismissal of this history, *Sherrill*, 337 F.3d at 163-64, is particularly untenable given that the Oneidas' removal both before and after the Treaty's signing was undertaken by New York and the United States precisely with the goal of ending the Oneidas' sovereign rights in New York. In contrast to the surplus land act allotments, where the Indians were expected to remain on their allotted lands in the vicinity of lands that were opened to settlement by others, the premise of the Buffalo Creek Treaty was that the Oneidas were to leave New York entirely and relocate on a new reservation. That the area has been for many years populated almost exclusively by non-Indians bears out this expectation. As this Court has held, "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471 (citations omitted); *see also Rosebud*, 430 U.S. at 604-05 (the



"longstanding assumption of jurisdiction by the State over an area that is over [99 percent] non-Indian . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset" by the strained reading of the statutes urged by the tribe).

Not surprisingly, the federal government has long since ceased to treat the 250,000-plus-acre area as a reservation. *See Rosebud*, 430 U.S. at 604-05 (the fact that neither Congress nor the Bureau of Indian Affairs has sought to exercise its authority over an area or to challenge the State's exercise of authority is a factor entitled to weight as part of the jurisdictional history). Accordingly, although a small number of Oneidas remained in New York, and continued to occupy a small parcel that eventually dwindled to 32 acres, the language, background and subsequent history of the Buffalo Creek Treaty compel the conclusion that the Oneidas relinquished all of their tribal sovereignty over all their former lands in New York when they accepted the new western reservation.

## II. The Oneidas' Agreement to Remove Was Binding and Relinquished Their Sovereignty over Their Former New York Lands.

1. There was nothing conditional about the Oneidas' relinquishment in the Buffalo Creek Treaty of their sovereignty over New York lands. In reaching the contrary conclusion, the Second Circuit characterized the Treaty as an "agreement to agree" conditioned upon subsequent land sales to New York State. *Sherrill*, 337 F.3d at 161. The language of the Treaty itself, in which the Oneidas agreed

to remove "as soon as" they disposed of their lands, not "only if" they were able to sell them, refutes this interpretation. The phrase "as soon as" refers to when, not whether, the Oneidas were to remove.[8] That most of the remaining Oneidas sold nearly all their lands to New York and removed within ten years after the Treaty's proclamation strongly suggests that they shared this interpretation. The Second Circuit's statement that "the sales to New York State were never accomplished, and the planned removal never took place," *Sherrill*, 337 F.3d at 162, is simply wrong. Although few Oneidas removed to Kansas, most Oneida land was sold to New York and the vast majority of the Oneidas left the State. *See New York Indians*, 40 Ct. Cl. at 469-71.

2. More importantly, characterization of the Oneidas' agreement to remove as conditional is contradicted by this Court's decision in *New York Indians*. In short, this Court has already interpreted the Buffalo Creek Treaty as an agreement by the Oneidas to remove. Indeed, as the Court recognized, the Indians' agreement to remove to the west was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in the Indian territory. *New York Indians*, 170 U.S. at 15. By virtue of that agreement, the Oneidas obtained an interest in the new lands that the United States became obliged to pay for years later, after it sold the land to non-Indian settlers. *See id.* at 26, 36. The possibility that the Oneidas might not actually remove

8. This Court recently characterized a treaty containing an agreement to remove "as soon as" an expected imminent event occurred as a removal treaty. *See Mille Lacs*, 526 U.S. at 189-90 n.4 (1999) (noting that the United States negotiated several "removal treaties" with Indian tribes in 1837 including one with the Saganaws, 7 Stat. 528, 530, in which "said tribe agrees to remove from the State of Michigan, as soon as a proper location can be obtained").



and their failure actually to occupy the Kansas lands did not undo their agreement or vitiate their rights to that territory. *Id.*

3. The benefit of the Oneidas' new reservation came with a corresponding burden, which the Nation now seeks to disavow: by agreeing to remove, the Oneidas relinquished tribal rights over their New York lands. *See, e.g., Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 225 (7th Cir. 1993) (tribe's acceptance of treaty benefits implies acceptance of treaty burden of surrender of right of occupancy), *cert. denied*, 510 U.S. 1196 (1994). This Court's precedent establishes that in accepting a new reservation, an Indian tribe may release and relinquish its rights in other lands. Thus, in *United States v. Santa Fe Pacific R. Co.*, the United States undertook by statute to extinguish Indian title to certain western land for the benefit of a railroad, subject to the limitation that that title could be extinguished only by the Indians' "voluntary cession." *Santa Fe*, 314 U.S. at 344. The Walapai Indians requested that a new reservation be created for them because of the encroachment of settlers onto their lands. The President created the new reservation by executive order, although only a few Walapais actually moved there. Nevertheless, this Court found that there was "an indication that the Indians were satisfied with the proposed reservation." *Id.* at 357. It concluded that even though the Walapais never made an explicit "voluntary cession" of their former lands, the creation of the new reservation and the Walapai's acceptance of it amounted to a relinquishment of the Walapai's "tribal rights in lands outside the reservation and notoriously claimed by others."

*Id.* at 357-58.[9] In this case, there is far more than "an indication" that the Oneidas were "satisfied" with their new reservation: they entered into a federal treaty agreeing to remove far away to the new reservation and ultimately recovered the value of the new reservation in this Court. Consequently, their "acquiescence in that arrangement" relinquished their sovereignty over their former lands outside the new reservation.[10] *Id.* at 358.

## III. The Additional Reasons Offered by the Second Circuit For Its Interpretation of the Treaty Are Unpersuasive.

1. The primary rationale relied upon by the Second Circuit in concluding that the Oneidas could have understood the Buffalo Creek Treaty as preserving sovereignty over their former New York lands was that their agreement to remove was conditional. *See Sherrill*, 337 F.3d at 161. Only in light of this view do canons of treaty

9. In *Santa Fe*, this Court found that creation of an earlier reservation never accepted by the Walapais did not extinguish their claim to their old lands. *Santa Fe*, 314 U.S. at 354-55. That holding does not control this case because the Oneidas agreed in the Buffalo Creek Treaty to remove from New York to their new reservation and accepted the benefit of the new reservation.

10. The United States' claim in its amicus curiae brief in opposition to the petition for certiorari that *Santa Fe* is inapposite here because it involved aboriginal rather than reservation land is belied by this Court's application of *Santa Fe* to the Oneida land claim. *See* Brief for the United States as Amicus Curiae (No. 03-855) at 11-12; *Oneida II*, 470 U.S. at 247-48 (citing *Santa Fe*, 314 U.S. at 346, 354).



construction relied upon by the circuit court, *id.* at 158-59; *see also Mille Lacs*, 526 U.S. at 196; *Oneida II*, 470 U.S. at 247, become helpful to respondents. In support of this view, the Second Circuit cited a statement apparently made to the Oneidas by Ransom Gillet, the United States treaty commissioner who negotiated the Buffalo Creek Treaty. *See* Brief of Respondents Oneida Indian Nation of New York, et al., in Opposition To the Petition For Certiorari at 10a-11a (No. 03-855); *Sherrill*, 337 F.3d at 161-62. Even if the statement is appropriately considered in interpreting the Treaty,[11] the court misunderstood its import.

At most, Gillet's statement advised the Oneidas that they would not be forcibly removed from the lands they occupied in 1838. This was not a new policy. Such voluntary removal was consistent with federal removal policy as articulated in the Removal Act's text (Indians could "choose to exchange" their lands for new western lands), and with President Jackson's view that removal "should be voluntary."

11. An unauthenticated photocopy of a handwritten version of this document appears in the record below as an exhibit to an attorney affidavit. Jt. App. (2d Cir.) 1312-13. In this Court, the Nation included a transcription of the Gillet statement in the appendix to its brief in opposition to the petition for certiorari. Respondent's Brief in Opposition to the Petition for Certiorari, 10a-11a. The Gillet statement was not incorporated into the Treaty's text, unlike a similar assurance given to the St. Regis Indians. Supp. Art., 7 Stat. at 561, 564 (explicitly providing that the United States would not compel the St. Regis Indians to remove). *See New York Indians*, 170 U.S. at 22-23 (treaty proviso adopted by the Senate never became effective because there was no evidence that the President ever approved it.)

*See* Removal Act, 4 Stat. at 411-12; First Annual Message, at 458. Consistent with this policy, and with federal encouragement, the Oneidas had been voluntarily removing from New York to Wisconsin during the 20 years before the Treaty's proclamation.

Nothing in the Gillet statement suggested that the Oneidas' original 250,000-plus-acre reservation was to remain intact. In fact, the statement contradicted that view, advising the Oneidas that "[t]hey can, if they choose to do so, *remain where they are* forever" (emphasis added). Even giving this statement the construction most favorable to the Oneidas, it would have meant that, at most, the Oneidas could continue to occupy only the 5,000 acres they had held in 1838, and that for as long as they did so, the tract would retain reservation status.[12] The Gillet statement certainly cannot be construed to assure the Oneidas that their reservation would continue even after they decided to sell their remaining lands to New York and leave the State. Thus, "as soon as" the remaining Oneidas sold all but 32 acres of their remaining lands, they had no reason to believe that tribal sovereignty would continue over lands they no longer occupied.

12. The better view, consistent with federal removal policies, is that the Gillet statement did not assure the Oneidas that tribal jurisdiction would continue even over any lands that they retained after the Buffalo Creek Treaty. *See, e.g.*, First Annual Message at 459 (the Indians "should be distinctly informed that if they remain within the limits of the States they must be subject to their laws"); Remarks of Sen. Frelinghuysen, 6 Reg. Deb. 309 (1830) (Indians refusing to remove would be subject "to State sovereignty and legislation").



Gillet's promise that the Oneidas would not be *forcibly* removed therefore cannot qualify or limit the Oneidas' binding agreement to remove from New York. His statement should be given the "sensible construction" that the United States would not force the remaining Oneidas to leave New York before they sold their remaining lands to the State, rather than being understood to impugn their agreement to remove and terminate their sovereignty in New York.[13] *See, e.g., Yankton*, 522 U.S. at 344-46 (where provision apparently preserving treaty rights appeared in text of Indian land cession agreement that Congress codified in surplus land act, this Court gave the provision a "sensible construction" rather than reading it to "eviscerate[]" the clear intent of the agreement to terminate the treaty rights). Indeed, in his letter to the Indian Affairs Commissioner, Gillet himself characterized his statement simply as an assurance that the Oneidas would not be compelled to remove without selling their land to New York. Respondents' Brief in Opposition, at 7a.

Accordingly, respondents can find no comfort in the canons of treaty interpretation. As this Court concluded in *Yankton*, "[t]he principle according to which ambiguities are resolved

13. In *Fellows v. Blacksmith*, 60 U.S. 366 (1857), this Court held that only the United States could forcibly remove the Senecas from their reservations pursuant to Buffalo Creek. *See also New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 371 (1859) (same); *The New York Indians*, 72 U.S. 761, 770 (1867) (New York could not tax the Seneca lands "[u]ntil the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations"). Similarly, the Second Circuit's earlier reference in *Boylan* to the "reservation" as in existence at the time of the Oneidas' 1842 treaty with New York, *see Sherrill*, 337 F.3d at 162-63, at most indicated that the "reservation" continued after Buffalo Creek to the extent that the Oneidas continued to occupy land in New York.

to the benefit of Indians tribes is not . . . 'a license to disregard clear expressions of tribal and congressional intent.'" 522 U.S. at 349, citing *DeCoteau*, 420 U.S. at 447; *see also Rosebud*, 430 U.S. at 587 (canon "does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary"). This Court must give effect to the Buffalo Creek Treaty's terms as agreed to by Congress and the Oneidas: "Congress and the tribe spoke clearly. Some might wish they had spoken differently, but we cannot remake history." *DeCoteau*, 420 U.S. at 449.

2. The Second Circuit's other arguments in support of its interpretation are likewise meritless. The court erred in relying heavily on the absence of explicit language of cession and payment in the treaty to support its conclusion that the treaty did not terminate the Oneida reservation. *See Sherrill*, 337 F.3d at 159-61. The underlying fee to the Oneida lands was held by New York State, which was not a party to the Buffalo Creek Treaty, rather than by the United States. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (original 13 states held the fee title or preemptive right to Indian lands within their boundaries). Instead of ceding their New York lands to the United States, which had no right to them, the Oneidas agreed in Article 13 to remove to the new reservation "as soon as" they sold their remaining New York lands to the State.[14]

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14. The Court erroneously contrasted the Oneidas to the Senecas and the Tuscaroras, who in the Buffalo Creek Treaty expressly ceded lands to Ogden and Fellows, the holders of the right of preemption to those Tribes' lands in western New York. 7 Stat. at 557-61. *See Sherrill*, 337 F.3d at 161. Unlike New York State, Ogden and Fellows were parties to the Treaty, and thus the Treaty contained a cession directly to them. Because New York was not a party to the Treaty, the most the Oneidas could agree to was removal following separate sales of their remaining lands to New York. 7 Stat. at 554.



3. Finally, the court below mistakenly held that the New York Oneidas were not intended to share in the Kansas lands because they "had a permanent residence in New York State." *Sherrill*, 337 F.3d at 162 n.17. Article 2 of the Treaty, read as a whole, refutes that finding. The Buffalo Creek Treaty set apart an amount of land in Kansas more than sufficient to provide 320 acres to each of the New York Indians enumerated in the census set forth in Schedule A to the treaty, including the 620 New York Oneidas specifically identified in Schedule A. *See* Sch. A, 7 Stat. at 556; *New York Indians*, 40 Ct. Cl. at 458. The treaty expressly provided that the Kansas lands were "intended as a future home" for the Oneidas residing in the State of New York, with the land to be divided equally according to the numbers set forth in Schedule A. 7 Stat. at 551-52. Moreover, the New York Oneidas shared in the recovery in *New York Indians*. Accordingly, the only viable conclusion is that the Oneidas agreed in the Buffalo Creek Treaty to remove from New York, and the Treaty disestablished or nearly entirely diminished the Oneidas' 1788 reservation.

## CONCLUSION

For the foregoing reasons, amicus curiae State of New York respectfully urges this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit and declare that the lands at issue are not "Indian country," because the Oneidas' 1788 reservation was disestablished or almost entirely diminished by the Buffalo Creek Treaty.

Respectfully submitted,

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# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,
*Petitioner,*

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEAULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR *AMICI CURIAE* THE PUYALLUP TRIBE OF INDIANS, THE SOUTHERN UTE INDIAN TRIBE AND THE PUEBLO OF ACOMA IN SUPPORT OF RESPONDENTS

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IN THE

# Supreme Court of the United States

No. 03-855

CITY OF SHERRILL, NEW YORK,
*Petitioner*,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEAULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR *AMICI CURIAE* THE PUYALLUP TRIBE OF INDIANS, THE SOUTHERN UTE INDIAN TRIBE AND THE PUEBLO OF ACOMA IN SUPPORT OF RESPONDENTS

## INTEREST OF *AMICI CURIAE*

*Amici Curiae* are two federally recognized Indian Tribes with reservations where a large amount of the land is in non-Indian ownership and a Pueblo in a populous part of New Mexico.[1] The *amici* are deeply disturbed by Petitioner's

[1] No one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of

assertion—contrary to experience throughout the country—that if local communities cannot tax lands owned by tribes—here the Oneida's repurchase of its own land—the result will be fiscal bankruptcy and jurisdictional chaos for the local communities. Nothing could be further from the truth, and the Court should not be misled. The truth is that Indian tribes contribute substantially to the economies of the surrounding communities in amounts far greater than any loss of property tax base to those communities, and have long ago worked out mutually helpful jurisdictional agreements.

The *amici* also have an interest in the continued role of this Court as a protector of Indian rights to property, self-government and economic development—a role often taken by the Court when others did not care. The unanimous decision of the Court, written by Justice White, in *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*), and this Court's opinion in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) (*Oneida II*), maintained that role for both the Court and the United States, as did the decision of the Second Circuit and district courts below. The *amici* submit this brief to assist the Court in reviewing the Oneidas' rights here at issue in an appropriate economic and intergovernmental context.

## SUMMARY OF ARGUMENT

The City of Sherrill and its *amici* make an essentially equitable plea, arguing that even if the State's land purchases were illegal, the Court should nevertheless deny relief to Oneida because of the purported economic and administrative burden that granting relief would impose on the State and the City. That argument is meritless, both because the State and its subdivisions should not be allowed to profit from the

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record for both parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.



State's own illegal actions, and because their contentions about the economic and administrative consequences of the Second Circuit's ruling are contrary to nationwide experience and the facts at Oneida.

The very first Congress made crystal clear in the Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790), now codified as amended at 25 U.S.C. § 177, that Indian land could only be purchased under federal auspices. Yet New York, purchasing Indian land without federal consent and at far less than its value in what has been found as clear bad faith, often ignored these laws. *See, e.g., Cayuga Indian Nation of New York v. Pataki*, 165 F. Supp. 2d 266, 347 (N.D.N.Y. 2001).

Based on consistent economic studies, tribal governments and their enterprises contribute dramatically to the financial well-being of local communities including their tax collections, through increases in land values, substantial purchases of goods, tourism income and increased Indian and non-Indian employment. These contributions far outweigh any loss of revenue from tribal lands being tax exempt. Moreover, governments ordinarily do not tax the property of other governments. New York and its cities and counties cannot tax the substantial federal holdings in the State, and states do not tax property owned by counties and cities. The reality is that nothing has so improved the previously depressed economy of the Sherrill area as the casino built by the Oneida Nation, the very same economic activity that has allowed Oneida to repurchase some of its land.

In addition, Congress in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, only allows casino gambling—such as that at Oneida—under a compact agreed to by the State. Those compacts—particularly after this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which ended federal court review of compact

terms—have regularly provided substantial income to states and local governments.

With regard to law enforcement and regulation, no jurisdictional or other "chaos" is created by the Oneidas' regaining tax exempt land or having it constitute "Indian Country." Congress granted New York jurisdiction over criminal offenses by Indians or against Indians and civil causes of action arising on Indian land in 1948 and 1950, 25 U.S.C. §§ 232 and 233, respectively, expressly reserving the tax exempt status of such land and federal court jurisdiction over Indian land transactions.

Finally, as this Court has recognized, "there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services and to provide law enforcement." *Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (O'Connor, J., concurring). Tribes continue to work hand in hand with federal, state and local governments—in an atmosphere of mutual respect—to address issues related to regulatory authority and to resolve concerns impacting funding arrangements for public services.

## ARGUMENT

### I. THE STATE OF NEW YORK AND ITS POLITICAL SUBDIVISIONS SHOULD NOT BE ALLOWED TO BENEFIT FROM THE STATE'S PRIOR ILLEGAL ACTS.

The City of Sherrill and its *amici* make an essentially equitable plea, arguing that even if the State's land purchases were illegal, the Court should nevertheless deny relief because of the purported economic and administrative burden that granting relief would impose on the State and the City.[2] That argument is meritless, both because the State and the

[2] *See* Sherrill Pet. for Cert. at 2, New York *Amicus* Br. at 1-2; Town of Lennox *Amicus* Br. at 2.



City should not be allowed to profit from the State's illegal actions, and because their contentions about the economic and administrative consequences of the Second Circuit's ruling are contrary to nationwide experience and the facts at Oneida.

The problems that the City of Sherrill alleges, if they were real, would come from a long refusal of the State of New York to accept the division of authority established in the Constitution of the United States. *See Oneida I*, 414 U.S. at 678 and n.13 (citing Gerald Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations*, 8 Buffalo L. Rev. 1 (1958)). The Articles of Confederation left ambiguous the powers of the States over Indian Nations. The Constitution has no ambiguity on this issue. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558 (1832). And the very first Congress made crystal clear in the Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790), now codified as amended at 25 U.S.C. § 177, that Indian land could be purchased only under federal procedures. Yet New York, purchasing Indian land without federal consent, and often at far less than its value, frequently and in bad faith ignored these laws. *See, e.g., Cayuga Indian Nation*, 165 F. Supp. 2d at 347.

New York's refusal to obey the law has created a situation where non-Indians have possession of areas of land which lawfully belong to Indian tribes. The federal courts in New York, relying in part on this Court's footnote on remedies in *Oneida II*, 470 U.S. at 254 n.27, have denied the New York Tribes the remedy of evicting non-Indians from Indian land. *Cayuga Indian Nation of New York v. Cuomo*, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442, at *17-30 (N.D.N.Y. July 1, 1999); *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 90-94 (N.D.N.Y. 2000). This means that the only way that the Tribes can regain some of their land is by purchases from willing sellers, or settlement of land claims—

in the latter situation at far less than their value. A balance has thus already been struck between the rights of the Tribes and the rights of the non-Indians very much in favor of the non-Indian possessors. Consequently, where a tribe can in fact repurchase its own land it is entitled to have the full value of that land, including its exemption from state and local taxation.[3]

In *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), this Court considered whether land within an Indian reservation allotted to individual Indians, sold to non-Indians and repurchased by the Tribe was subject to state and local taxation. In reviewing the allotment statutes passed by Congress, the Court held that the land in question was taxable, but only because those federal statutes unmistakably allowed such taxation. In a unanimous opinion by Justice Thomas, the Court held that state and local governments may not tax tribally owned land within the

[3] The Town of Lenox argues, Lennox *Amicus* Br. at 19-21, that even if tribes are denied the right to evict unlawful possessors of their land, and even if a tribe purchases its own land from a willing seller, the tribe should still be required to go through 25 U.S.C. § 465 procedures with the Secretary weighing the desirability of returning property to Indian status before a tax immunity could be recognized. But 25 U.S.C. § 465 was part of the 1934 Indian Reorganization Act ch. 576, 48 Stat. 985, designed to allow the Secretary to acquire land for Indian tribes regardless of the land's prior status. It has no applicability to the return of a tribe's illegally held land. Further, any balance between Indian and non-Indian interests has already been more than met by the denial of the right of eviction. It would be grossly unfair to a tribe to deny it the right to evict, require it to buy back its own land and then impose still another gate for the Tribe to go through. This is particularly so because the Secretary's track record in preserving Indian land in New York is too poor to justify the Court's granting the Secretary additional discretion not provided by Congress.



boundaries of Indian reservations absent clear congressional permission to do so:

> absent cession of jurisdiction or other federal statutes permitting it. . . . We have consistently declined to find that Congress has authorized such taxation unless it has made its intention to do so unmistakably clear.

*Id.* at 110 (citations and internal quotations omitted).

Congress has not authorized taxation of Oneida lands. Indeed, Congress in 1950 in extending certain civil jurisdiction over Indian reservations to the State of New York specifically stated that "nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes . . . ." Act of Sept. 13, 1950, Pub. L. No. 81-785, ch. 947, § 1, 64 Stat. 845 (codified as amended at 25 U.S.C. § 233). That statute should be the end of Sherrill's argument.

## II. THE ARGUMENTS OF THE CITY OF SHERRILL AND ITS *AMICI* THAT THEIR TAX BASES AND ECONOMIC WELFARE WILL BE DESTROYED BY THE DECISION BELOW ARE WITHOUT MERIT; TRIBAL GOVERNMENTS AND ENTERPRISES CONTRIBUTE SUBSTANTIALLY TO THE FINANCIAL WELL-BEING OF SURROUNDING LOCAL COMMUNITIES AND TO THE STATE'S OVERALL ECONOMY.

The Oneida Nation, purchasing back its own land and having that land be tax exempt, does not pose a threat to local communities. Indian tribes have possessed tax exempt lands in or near non-Indian communities across the country for hundreds of years. Sherrill's complaint that Oneida purchases of its own land from willing sellers in and around the City of Sherill does the City irreparable damage has no basis in fact. The district court, denying Sherrill's motion for a preliminary injunction, specifically rejected Sherrill's assertion that it is

"on the verge of extinction" as a result of Oneida's land purchases:

> Sherrill's contention that it is on the verge of extinction is exaggerated. Sherrill has had budget surpluses for the last five years. (First Carmen Aff. Ex. 31). Sherrill retorts that each year its surplus becomes less and less. Sherrill's financial condition is not indicative of being on the brink of bankruptcy, and is not supportive of a claim of irreparable harm.

*Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 255 (N.D.N.Y. 2001).

This is not surprising. The costs to a local jurisdiction of an Indian tribe buying land in or around it are usually far outweighed by the economic growth and development that the tribe brings to the area. As a result of this economic growth, real estate increases in value, thus causing property tax collections to rise. Further, as a result of substantial purchases of goods and services by tribes and their members, and increased employment for Indians and non-Indians alike, local governments gain substantial additional revenue as shown by a number of consistent economic studies. *See* Veronica E. Tiller and Robert A. Chase, *Economic Contributions of Indian Tribes to the Economy of Washington State* (1998) (commissioned by the State of Washington and the Washington tribes) (hereafter Tiller and Chase). App. A, *infra*; *New Mexico Study Group, Indian Reservations and the New Mexico Economy: Monograph 1: Reservation-Based Gaming Enterprises* and *Monograph 2: Tourism* (1999) (hereafter New Mexico Study). App. B, *infra*; Economic Development: S. Hrg. 105-572 Before the Sen. Comm. on Indian Affairs, 105th Cong. 129 (1998) (Prepared statement of Robert F. Robinson, President, The Center for Applied Research, Inc.) (hereafter Robinson), *available at* http://indian.senate.gov/1998hrgs/0409_rr.htm; Ethel Steinmetz and Thomas O. Skjervold, *Estimating Native American Contributions to Washington State Tax Revenue*, *available at* http://www.evergreen.edu/nwindian/pdf/enacwstr/Full.pdf. Showing that the same is true at Oneida, *see* Zogby Int'l, *Oneida Indian Nation Economic Impact Study 2000* (hereafter Oneida Economic Impact Study) at JA 237-76.



That Oneida lands should be exempt from taxation is not unusual. Governments in the United States commonly exempt each other's property from taxation. Federal property is immune from state taxation.[4] Yet one rarely hears of a state asking for a federal facility such as a military base to be closed – to the contrary, the states commonly fight against such closures. This is because military bases, like Indian reservations, add more to the economy than any cost of tax exempt land. The United States does not tax state and local government properties.[5] Nor does the United States tax Indian tribes.[6] Similarly, many states in their constitutions or by statute, including New York, have created property tax exemptions for lands owned by local governments.[7]

The State of Washington this year enacted legislation that *in addition* to exemptions provided by federal law exempts

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[4] *United States v. New Mexico*, 455 U.S. 720, 733 (1982).

[5] The federal government does not have a tax on real property so there is no issue concerning the federal taxation of state lands. With respect to income tax, the Internal Revenue Code provides that "Gross income does not include—(1) income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof, or the District of Columbia . . . ." 26 U.SC. § 115(1).

[6] Rev. Rul. 94-16, 1944-1 C.B. 19.

[7] *See, e.g.*, N.Y. Real Prop. Tax Law § 406; Ariz. Const. art. 9, § 2, cl. 1; Me. Rev. Stat. tit. 36, ch. 105, § 651(1)(D); N.M. Const. art. 8, § 3; Utah Code § 59-2-1101(2)(c); Wis. Stat. § 70.11(2).

tribally-owned property on or off reservations, regardless of status, from state taxation if used for certain purposes:

> (1) All property belonging exclusively to the United States, the state, or any county or municipal corporation; all property belonging exclusively to any federally recognized Indian tribe located in the state, if that property is used exclusively for essential government services . . . is exempt from taxation.
>
> * * *
>
> (2) For the purposes of this section, "essential government services" means services such as tribal administration, public facilities, fire, police, public health, education, sewer, water, environmental and land use, transportation, and utility services.

Wash. Rev. Code § 84.36.010.

Thus, the fact that property owned by the Oneida Nation within the City of Sherrill will be exempt from state and local taxes is hardly earth shaking.

### A. Indian Enterprises Increase Land Values Which Serves To Raise Local Income From Real Estate Taxes.

As noted, the district court rejected the City of Sherrill's argument that the Oneida Indian Nation's land purchases create a crisis for the City. Real estate brokers in the Sherrill area go further. They state that as a result of Oneida activities, real estate values in the City of Sherrill and surrounding counties are rising. One Oneida County real estate broker noted that "[t]he prices are on the rise as homes are harder to find." *Oneida Economic Impact Study* at JA273. Similarly, an Oneida and Madison County realtor commented that "[t]he Oneida Nation has flourished and that has helped bring other businesses. They find Central New York good for business. I am very positive about the future here." *Id.* at JA275.



Oneida's positive impact on the real estate market is not unusual. In Connecticut, for instance, the Mashantucket Pequot Tribe's successful tribal operations "in New London County dampened the recession in employment and housing prices in the early 1990s and contributed substantially to the economic rebound of the region through the decade. This included a positive return to housing investment." Univ. of Conn. Center for Economic Analysis, *The Economic Impact of the Mashantucket Pequot Tribal Nation Operations on Connecticut* at 24 (Nov. 28, 2000), *available at* http://ccea.uconn.edu/studies/Mashantucket%20Final%20Report.PDF.

A report commissioned by the State of Wisconsin concluded that if the Wisconsin Oneida Casino were closed "[r]esidents of the region would face an increase of over $9.5 million in property taxes to replace funds no longer provided by the Oneida." Michael K. Evans, Evans, Carroll & Assocs., *The Economic Impact of Indian Casino Gaming in Brown and Outagamie Counties* at 24 (Feb. 2003).

### B. Indian Purchases Of Goods And Services Add Substantially To The Local Economy And Local Tax Collection.

Although tribally-owned enterprises are mainly located on Indian lands, they usually purchase most of their supplies and services off the reservation. Most reservations simply do not have the suppliers of goods and services needed to run a tribal enterprise. As a result, tribes and tribal members spend millions of dollars every year on goods and services obtained from local communities. This helps create strong local economies.

In FY 1998 "residents of Indian reservations . . . ma[de] approximately $3.1 billion in annual personal consumption expenditures off the reservation . . . [t]ribal governments . . . $1.2 billion in annual expenditures off their reservations for goods and services . . . [and] reservation-based businesses

(e.g., mining companies, energy producers, and tourist, gaming and fine arts enterprises) . . . approximately $4.4 billion." Robinson at 129. These expenditures add greatly to the economy of the surrounding communities, and directly or indirectly add to the local tax base.

This effect is well documented in Tiller and Chase, a study commissioned jointly by the State of Washington and its tribes. In Washington, tribes own and operate a variety of enterprises, including: traditional natural resource production, construction, wholesale and retail trade, finance, insurance and real estate, gaming and government. App. A, *infra* p. 12a. Many tribes in Washington purchase most if not all of the goods and services needed to run these businesses off the reservation. *Id.* at 16a. In aggregate, tribally-owned enterprises in the State spent an estimated $1.003 billion on business expenses in 1997. *Id.* at 22a. Of this amount, approximately $865.8 million was spent statewide for supplies, equipment and services. *Id.*

Similarly, the New Mexico Study found that there are eleven Indian reservation-based gaming enterprises, all of which are located near large and small communities throughout the State. App. B, *infra* p. 38a. Together, the State of New Mexico gained $64.7 million in state tax revenues directly or indirectly in 1998 from the goods and services purchased by tribal gaming enterprises in the State. *Id.* at 40a.

Individual Indian residents of reservations also make significant contributions to local communities because of their need to shop at off-reservation establishments for day to day living necessities. Tiller and Chase found that "[m]ost retail sales and services in Washington are conducted off reservations at non-Indian establishments, including border towns that largely owe their livelihoods to Indian patronage." App. A, *infra* p. 16a. Moreover, tourists and patrons of tribal businesses also end up spending money in local communities in addition to monies spent on tribal lands. Tourism in New



Mexico during 1998 generated $2.14 billion, with 13.4% of that being attributable to visitors motivated by Indian culture. App. B, *infra* p. 45a. Aside from the local businesses that benefit from Indian driven tourism, New Mexico gained $33.8 million in state sales tax. *Id.* at 45a-46a.[8]

The Oneida Indian Nation of New York, in a similar fashion, contributes enormously to the local economies and thus directly or indirectly to state and local revenues. In 2000, the Nation spent over $120 million on goods and services. *Oneida Economic Impact Study* at JA250-51. More than 47% of the Tribe's purchases were obtained from businesses located in the State of New York. *Id.* at JA251. Given the significant amount of money tribes spend on various goods and services, and the multiplier effect of these purchases on the economy as a whole, it is clear that states and local businesses and communities are financially benefiting from Oneida-owned enterprises.

### C. Indian Tribes Have Become Major Employers, Generating Taxes For The State And Jobs And Taxes For Local Communities.

Sherrill's claim of economic disaster is further refuted by the enormous employment the Oneida Nation has brought to a formerly depressed area. As discussed above, Indian purchases contribute to the revenue levels of local and state economies as do increased land values, thus increasing tax collections. The same is true of employment.

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[8] The New Mexico Study recognized "[t]ourism is not a single industry, but rather a collection of trade and service sectors . . . . Lodging, eating and drinking establishments, certain recreational services, transportation, and various retail trade sectors comprise the 'tourism' industry in New Mexico." App. B, *infra* p. 44a. So, even though tourists' desire to visit a place may be driven by the presence of Indian tribes, a significant portion of the money spent by tourists will benefit local off-reservation business and states via sales taxes.

The New York Oneida Nation Enterprises directly employed 2,857 workers during the 2000 fiscal year and with capital outlays factored in, 3,401 jobs were directly related to the economic activities of Oneida Nation Enterprises. *Oneida Economic Impact Study* at JA238. Eighty-six percent were held by non-Native Americans. *Id.* at JA243

> In 2000, Madison, Oneida, and Onondaga counties received approximately $264,849, $1.9 million and $324,813 respectively, in tax revenues due to employment at the Oneida Nation Enterprises. In addition, the three counties will share $1.7 million in revenues resulting from indirect job creation through the multiplier and capital outlays.

*Id.* at JA254.

*Amicus*, the Southern Ute Indian Tribe runs a waste water treatment plant and commercial gravel operations, and engages in energy development (coal bed methane). The Tribe and its associated enterprises employ over 1000 people in southwest Colorado. Memorandum from Sam W. Maynes and Monte Mills, attorneys, Maynes, Bradford, Shipps & Sheftel, LLP, to Harry R. Sachse 4 (Sept. 2, 2004). Almost 500 of these employees are in La Plata County alone (the location of the tribal headquarters), with an annual payroll of over $20 million. *Id.* Moreover, 69% of these employees are non-tribal members. *Id.*

Similarly, during 1997, in Washington State, tribally-owned enterprises employed 14,375 workers with labor earnings of approximately $270 million. App. A, *infra* p. 18a. The total payroll of $270 million supports an annual contribution of approximately $5.3 million in state employment/payroll related taxes and $5.4 million to the state unemployment insurance fund. *Id.* at 24a, 20a. In Washington, "approximately 4 out of every 10 workers employed by tribal-owned enterprises are non-Indian." *Id.* at 18a.



The Mississippi Band of Choctaw Indians (hereafter MBCI) owns and operates a diverse range of businesses.[9] Among some of the Tribe's businesses are an American Greeting Card Factory, an Electronics Enterprise (Choctaw Electronics), a commercial printer (First American Printing & Direct Mail), two automotive and non-automotive wiring companies (Choctaw Manufacturing & Chata Enterprise) and a plastic molding company (First American Plastic Mold ing Enterprise). MBCI website, http://www.choctaw.org/economics/tribal_business_overview.htm (last visited Sept. 28, 2004). Significantly, the MBCI's businesses "provide[ ] more than 8,000 permanent, full time jobs for tribal members and others (more than 65 percent of its workforce is non-Indian)." *Id.* The Tribe's annual payroll exceeds $123.7 million. *Id.*

Tribal enterprises not only generate state and local tax revenue, but more importantly, improve jobs and help sustain healthy Indian and non-Indian economies. According to Tiller and Chase "tribal enterprises have been major contributors to the alleviation of severe unemployment, both *on and off* reservation." App. A, *infra* p. 25a. (emphasis added). The Mississippi Choctaw discussed above, are the largest employers in their county (Neshoba County), and among the ten largest employers in Mississippi. MBCI Website, *supra.* Given the tribal business success, State political leaders have urged the Tribe *to buy more lands*. "[F]ormer Senator John C. Stennis requested that the Choctaws place one of [their] manufacturing plants in Kemper County to spur local employment opportunities. The development of another one of [the Choctaws'] plants was the direct

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[9] The Mississippi Choctaw Tribe, like the Oneida, has land interspersed with non-Indian owned land. Mississippi opposed recognition of Choctaw land as a reservation raising issues remarkably like those raised by Sherrill and its *amici* here. *See Amicus* Brief of the State of Mississippi at 9, 20-44, *United States v. John*, 437 U.S. 634 (1978) (Nos. 77-575, 77-836). This Court rejected those arguments. *John*, 437 U.S. at 648-50.

result of an inquiry from Senate Majority Leader Trent Lott to see if the Tribe might acquire a direct mail operation that was in bankruptcy in his home county." Economic Development: S. Hrg. 105-572 Before the Sen. Comm. on Indian Affairs, 105th Cong. 55 (April 9, 1998) (Prepared statement of Chief Philip Martin, Chief of the Mississippi Band of Choctaw Indians), *available at* http://indian.senate.gov/1998hrgs/0409_pm.htm.

### D. States And Local Governments Have Gained Significant Revenues From Possessory Interest Taxes On Indian Lands.

Although Indian lands are tax exempt, income from leases of such land to non-Indians is often subject to state taxation. Thus non-Indian lessees of tribal minerals or other natural resources pay substantial severance taxes to state and local governments. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989).

California imposes a possessory interest tax on leases held by non-Indians—such as hotel corporations—on tax exempt Indian property. The Agua Caliente Tribe challenged this tax, but the Ninth Circuit upheld it and this court denied review. *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). While we believe this tax remains subject to challenge, Agua Caliente lessees in 2003 paid almost $24 million in possessory interest taxes to three cities and the county for leases on tax exempt real property. Keith A. Shibou, C.P.A., Accountancy Corporation, *Agua Caliente Band of Cahuilla Indians, Property Taxes Paid to County of Riverside For the Fiscal Year Ended June 30, 2003*, Schedule B.



### E. Gaming Compacts Provide Revenues For State And Local Governments.

Indian people as a whole are still among the poorest in the nation with inadequate housing and medical care and high unemployment. *A Quiet Crisis, Federal Funding and Unmet Needs in Indian Country*, U.S. Comm'n on Civil Rights, July 2003, at ix-xii. But Indian tribes began to pull themselves out of poverty in the 1980s by asserting their right to self-government and by operating bingo and later casino gambling on their reservations. If states could have lotteries, or authorize casinos to raise money, why could tribes not do the same? In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court upheld the right of tribes to run gaming establishments under their own laws in states that do not outlaw gambling.

The next year Congress passed the Indian Gaming Regulatory Act (IGRA), providing comprehensive regulation of Indian gaming. 25 U.S.C. §§ 2701-2721. Under IGRA, a tribe can operate a casino (Class III gaming) only if it has entered into a compact with the state setting out the terms on which the gambling can take place. IGRA specifically requires such compacts, and provides that they may include among other things "(ii) the allocation of criminal and civil jurisdiction," "(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity," and "(vii) any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C). These compacts usually provide where the gaming can take place, the games that can be played, the number of gaming machines allowed, and the payment to be made to defray state and local expenses.

Under IGRA as written, if a tribe did not think a state was bargaining fairly, it could bring the state into federal court and have the court decide between the compact terms proposed by the tribe and those proposed by the state.

§ 2710(d)(7). In that time period, compacts tended to cover very specific expenses of the state and local communities. But this Court held that the IGRA federal court review provision violated the immunity of the states under the 11th Amendment. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Following *Seminole*, without judicial protection, compact terms are arrived at through more expansive government to government negotiations. Most states want Indian gaming, because it is a major source of employment and state and local governmental funding. Tribes negotiate with the states as to the terms of the compacts in that context, but also against the background of an unreviewable state veto. States thus have enormous bargaining power as to the conditions imposed by gaming compacts.

The State of New York apparently did not negotiate with the Oneida Tribe for a compact provision covering costs to itself or the local community. Oneida, however, has voluntarily made substantial payments to local communities. Between 1996 and August 2000 the Oneida Nation donated over $1.236.564 to the Vernon-Verona-Sherrill School District alone. *Oneida Nation sends more aid to school dists.*, Rome Daily Sentinel, Aug. 3, 2000, at JA218. In subsequent negotiations with other tribes, New York has insisted on revenue sharing provisions and is currently negotiating with a number of tribes to allow them to run casinos as part of land settlements that will take considerable areas of land out of the local tax bases.[10] New York and the local communities fully

[10] Compacts in other states have various provisions on reimbursements or payments to state and local governments. In Washington State, tribes pay up to 2% of the casino net to local governments to reimburse them for impacts that the casino causes to the local governments' services and budgets; and the revenue from a certain number of tables or machines is paid to local charities.

Wisconsin compacts vary from tribe to tribe. Recently, however, the owner of a dog race track sought to have all the compacts declared illegal. Wisconsin and the Tribes have equally opposed this effort. *See* Briefs of State of Wisconsin and *Amici Curiae* St. Croix Chippewa Indians of Wisconsin *et al.* (both filed Jan. 13, 2003), *Dairyland Greyhound Park v. Doyle*, No. 01-CV-2906, Cir. Ct. Branch 6, State of Wisconsin. As part of its opposition, Wisconsin provided the court with an economic report entitled *Revenue Loss to the State of Wisconsin if Casino Gaming Facilities Were Closed.* (prepared by Michael K. Evans, Evans, Carroll & Assocs.) (Jan. 2003) (Ex. 2 in that proceeding). The report concludes that if the casinos were closed, Wisconsin in 2002, would have lost $24 million in direct revenue sharing payments under the compacts, as well as a total tax loss based on payroll and sales taxes of just under $100 million. *Id.* at 15.



understand that it is to their advantage and the advantage of the State to enter into such transactions because of the economic growth that will be provided by the casinos. *See* James C. McKinley Jr., *Groundwork Laid for a Casino in the Catskills*, N.Y. Times, May 13, 2003. Another article refers to developers and tribes that "have been drawn by Gov. George E. Pataki's ambitious plan to dot the state with casinos as a way to generate state income." Iver Peterson, *Midwest Tribes See Big Payoffs in the East*, N.Y. Times, March 24, 2003.

Given the huge economic growth and tax revenues through payroll and sales taxes that the Oneida Casino has contributed to the City of Sherrill and the State of New York, and New York's eagerness to have additional casinos even at the cost of land going out of tax status, the "destruction of the cities" and unfairness to local community arguments advanced by Sherrill and its *amici* in our view cannot even pass the "straight face" test.

In sum, states under legislation enacted by Congress have enormous-power over gaming by Indian tribes, and in recent years have used those powers to more than compensate themselves and local communities for any loss of revenue created by Indian lands being held or returned to non-taxable status.

### F. Tribes Contribute To A Variety Of Community Efforts.

We have emphasized the increased economic growth and tax revenue to state and local governments from tribal activities—increased real estate values, off-reservation purchases, employment of Indians and non-Indians—revenues that greatly surpass any lost property taxes. This obviously contributes to the economic well-being of the entire community – Indian and non-Indian alike.

Apart from these direct economic benefits, tribes assist local economies in other ways. The Puyallup Tribe "has donated half a million dollars to a local hospital to help with a new children's health center [and] about a quarter of a million dollars to one of the small local fire districts to purchase a new fire truck." Puyallup Indian Tribe, Survey Information Response at 3.

*Amicus* the Southern Ute Indian Tribe is the primary sponsor of a public radio station, KSUT, which serves the surrounding community. Memorandum from Sam W. Maynes and Monte Mills to Harry R. Sachse, *supra* p. 14, at 4. In early 2004, the Tribe donated 35 acres to the regional hospital in the Durango/Four Corners area. *Id.* at 5. Additionally, the Tribe and regional hospital have agreed that the Tribe will contribute approximately $2 million for the establishment of a dialysis department in the new hospital. *Id.* The New York Oneida make similar generous contributions. *See* the donations to school districts listed *supra* p. 18.



## III. THE ARGUMENTS OF THE CITY OF SHERRILL AND ITS *AMICI* ON "ADMINISTRATIVE CHAOS" ARE WITHOUT MERIT; NEW YORK HAS LONG HAD CRIMINAL AND CIVIL JURISDICTION WITHIN INDIAN COUNTRY AND NATIONALLY THERE ARE HUNDREDS OF COOPERATIVE AGREEMENTS BETWEEN TRIBES, STATES AND LOCAL GOVERNMENTS.

Far from the chaos and uncertainty which Petitioner and its supporting *amici* predict, Indian tribes have in fact become partners with state and local governments to resolve issues of jurisdictional authority and to work together to address concerns impacting funding for public services. This Court has recognized that "there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement." *Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (O'Connor, J., concurring). These cooperative agreements evidence the ability of tribal, federal, state and local governments to work hand in hand—in an atmosphere of mutual respect—to foster a high level of stability and certainty for their mutual benefit.

Although Petitioner and its supporting *amici* dismiss the relevance of cooperative agreements, *see* Town of Lennox *Amicus* Br. at 2 and n.4, this Court has previously recognized that such agreements are a preferred method and at times the only method—to effectively balance the interests of both the states and the tribes. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (although tribal sovereignty precludes states from suing tribes to collect certain taxes, states may "enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection" of the tax). As a result at least in part of this Court's admonitions, states and tribes have addressed issues of

mutual concern through the negotiation of hundreds of cooperative agreements, covering a broad range of topics, during the past decade. *See States and Tribes, Building New Traditions*, National Conference of State Legislatures (James B. Reed and Judy A. Zelio eds., Nov. 1995); David H. Getches, *et al.*, *Federal Indian Law* 619-620 (4th ed. 1998). These cooperative agreements, in addition to taxation, address, often in a very detailed and sophisticated manner, issues relating to criminal and civil regulatory authority, environmental compliance, zoning, land use planning, education and transportation.[11]

### A. The Orderly And Uniform Application Of Law By The State And Local Governments Is Not Jeopardized By The Presence Of Indian Country In The State Of New York.

#### 1. State criminal and civil jurisdiction generally.

*Amicus* State of New York makes the disingenuous argument that the Second Circuit's decision creates a "patchwork of tribal and state civil jurisdiction that jeopardizes the orderly and uniform application of law." New York *Amicus* Br. at 2. The State fails to provide any examples to support this claim, and cannot. States have long had jurisdiction over crimes between non-Indians on Indian reservations. *United States v. McBratney*, 104 U.S. 621 (1882). In 1948, as we have discussed above, Congress

[11] *See, e.g.*, Memorandum of Understanding between the Sitka Tribe of Alaska and the City and Borough of Sitka (Tribe and City meet twice a year to further develop their cooperative relationship and to discuss issues such as taxes, zoning, economic development and protection of cultural and historic preservation); and the Cooperative Plan Process, Town of Hobart and the Oneida Tribe of Indians of Wisconsin at Introduction (a long-term comprehensive plan for the development of transportation, housing, land use, etc. "with a blueprint for cost-effective future growth and development" that is viewed "as another step in cooperative efforts by the town and tribe to meet the future needs of its citizens").



granted the State of New York jurisdiction over "offenses committed by or against Indians on Indian reservations within the State of New York. *See* Act of July 2, 1948, Pub. L. No. 80-881, ch. 809, 62 Stat. 1224 (codified as amended at 25 U.S.C. § 232). In 1950 Congress granted New York jurisdiction in civil actions "between Indians or between one or more Indians and any other person" regardless of where the action arose.[12]

Thus, the status of the lands at issue in this case as "Indian country" has no impact on the ability of the State of New York to exercise criminal and civil jurisdiction over disputes arising on these lands in the same manner as it has over other Indian country for over 50 years.

#### 2. Planning and Land Use.

The State of New York and other Sherrill *Amici* suggest that the jurisdiction created as a result of the Second Circuit's decision will undermine the ability of local governments to effectively implement community planning and control and will de-stabilize local self-government.[13] But this Court has greatly limited the authority of an Indian tribe to zone non-Indian land in areas that are mostly populated by non-Indians. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). On Indian land tribes generally work out agreements with local governments on

[12] As we have noted, *supra* pp. 6-7, in doing so Congress specifically withheld state and local power of taxation over "lands within any Indian reservation in the State of New York" and state jurisdiction over ownership of Indian land relating to transactions before September 13, 1952. These acts were the model for Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (1953) (now codified as amended at 25 U.S.C. § 1321), which granted similar powers to a number of other states.

[13] *See, e.g.*, New York *Amicus* Br. at 1-2.

zoning and land use. These are issues successfully dealt with across the nation.

A prime example is the situation of the Agua Caliente Indian Reservation in California, located in a nearly perfect checkerboard due to historic factors.[14] Today, the lands of the Agua Caliente Indian Reservation include large parts of the cities of Palm Springs and Cathedral City, and a small part of the city of Rancho Mirage and a portion of the unincorporated part of Riverside County. The local governments and the Tribe recognized that in order to make planning and land use control work efficiently and effectively, intergovernmental cooperative agreements would be required. As a result, the Tribe has entered into a series of land use contracts with Palm Springs, Cathedral City, Rancho Mirage and Riverside County.[15] The essential features of these land use contracts include: (1) the Tribe adopts and applies city's land use controls (*e.g.*, zoning, building code, variances, etc.) to tribal lands; (2) the Tribe designates the city to act as its agent in enforcing compliance and the city collects and keeps all fees; (3) any final action of the city regarding development of tribal lands may be appealed to the Tribal Council.

[14] In 1873, Congress wanted the Southern Pacific Railroad to build a rail line from Yuma, AZ to Los Angeles, CA with its route going through the Coachella Valley. The railroad did so and was rewarded by the grant of all odd-numbered section of land within 10 miles of the rail line, with certain exceptions. When Presidents Grant and Hayes wanted to establish a reservation for the Agua Caliente Band of Cahuilla Indians in 1876-77, the only available lands were the unreserved and unappropriated even-numbered sections—a true checkerboard.

[15] *See* Land Use Contract Between City of Palm Springs and the Agua Caliente Band of Cahuilla Indians (original contract 1977, with Supplements 1-5); Land Use Regulation Agreement By and Between the City of Cathedral City and the Agua Caliente Band of Cahuilla Indians (1984, revised 1997); Rancho Mirage/Agua Caliente Band of Cahuilla Indians Land Use Contract (1998); Riverside County/Agua Caliente Band of Cahuilla Indians Land Use Contract (1989).



Oneida has addressed these issues by adopting the National Building Code as its building code, Oneida Indian Nation Ordinance O-94-01B at 2-3, July 8, 1998, and zoning and land use ordinances much like those found in any municipality. Oneida Indian Nation Land Regulation Ordinance O-96-01, Sept. 3, 1996; Oneida Indian Nation Environmental Protection Ordinance O-98-07, Nov. 24, 1998.

### 3. Utility Services.

Most utilities are owned and operated by private companies, not local governments, and Indian tribes and Indian people must and do make payments directly to those companies. Sometimes, however, utilities are owned and operated by an Indian tribe which provides services to homes and businesses both on and off its reservation. A good example is *amicus* Southern Ute Indian Tribe which provides both water and waste water treatment to its own people and those of the surrounding community. In 1999, the Tribe financed and constructed a $6 million wastewater treatment facility that jointly serves the Tribes and users in the Town of Ignacio through the Ignacio Sanitation District. Memorandum from Sam W. Maynes and Monte Mills to Harry R. Sachse, *supra* p. 14, at 2. Then in 2001, the Tribe financed the construction of an $11 million water treatment facility that provides water not only to the Tribe's headquarters, but also to the Town of Ignacio and local residents. *Id.*[16] Where utility services are

[16] In the State of Washington, the Squaxin Island Tribe also provides such services. It owns and operates the Kamilche Water system which supplies water to the tribal government, and to homes and business both on and off the Squaxin Island Reservation. Squaxin Island Tribal Response Points to Harry R. Sachse 1. Users are charged a fee for the service. *Id.* The Tribe is in the process of substantially updating and expanding the sewage treatment facilities at no expense to the local government. *Id.*

offered by a local non-Indian government. Indian tribes and individual Indians commonly pay for those services.[17]

Garbage pick-up and solid waste disposal are also often arranged in a mutually beneficial manner. A good example is the Intergovernmental Cooperative Agreement for Landfill Disposal Services between the Brown County Solid Waste Board and the Oneida Tribe of Indians of Wisconsin (1999). The purpose of the Agreement is "to establish a fixed disposal rate (and subsequent increases) at the Board's landfill for all waste generated by the Tribe and to guarantee the County a minimum volume of waste for disposal." Agreement ¶ 1(D). The Agreement assures the Tribe of a safe and reliable site for waste disposal, while ensuring the continued viability of the landfill.

Fire and emergency services are no different. Tribes routinely enter into agreements with local fire districts in a cooperative effort to protect lives and property.[18] And, as we

[17] Again, in the State of Washington, the Tulalip Tribes and the City of Marysville entered into an agreement to wheel water from the City's water system to the Tribes. *See* Tulalip Tribes and City of Marysville "Wheeling Agreement." The Tribes agreed to pay a lump sum of $1,407,999 as a wheeling charge and for the construction of a dedicated tribal line to the reservation. *Id.*

[18] *See, e.g.*, Memorandum of Understanding Between Squaxin Island Tribe and Mason County Fire Dist. #4 at 1 (Oct. 4, 2002) (agree to "design, develop, construct and maintain a fire station on tribally owned lands . . ."); Agreement Between the Bishop Rural Fire Prot. Dist. and Bishop Paiute Tribe for the Provision of Fire Prot. and Suppression Servs. on the Bishop Paiute Reservation (Oct. 16, 2002); Fire and Emergency Med. Servs. Agreement By and Between the Tulalip Tribes of Wash. and the Marysville Fire Dist. (Oct. 2, 1999); Automatic Aid Agreement By and Between the County of Riverside and the Cabazon Band of Mission Indians (May 5, 1998); and Agreement Between the City of Snoqualmie and the Snoqualmie Tribe for the Provision of Police, Fire, and Emergency Med. Servs. to the Snoqualmie Hills Project and Sewer Utility Serv. to the Tribe's Initial Reservation (April 26, 2004).



have noted, *amicus*, the Puyallup Tribe recently contributed about $250,000 to purchase a fire engine for a local non-Indian fire district. *See supra* p. 20.

### B. Federal And Tribal Programs Have Been Specifically Designed And Implemented To Offset The Impact Of Tax Exempt Trust And Restricted Fee Lands On The Tax Base Of State And Local Governments.

#### 1. Education Programs.

Local communities do not lose monies for essential programs such as schools as a result of being located near Indian lands. Both federal programs and tribal funds are used to subsidize local schools. Indian education programs, for example, benefit schools attended by Indian children whether run by the tribe or a local community. Among these federal education programs are: the Indian Education Act (Title VII of the No Child Left Behind Act of 2001), Pub. L. No. 107-110, 115 Stat. 1425 (hereafter NCLBA of 2001), *codified as amended at* 20 U.S.C. §§ 7401-7546; Federal Impact Aid (Title VIII of the NCLBA of 2001), *codified as amended at* 20 U.S.C. §§ 7701-7713a; and the Johnson O'Malley Act (Title X of the NCLBA of 2001), *codified as amended at* 25 U.S.C. §§ 452-457.

*Amicus* Southern Ute, similar to the New York Oneida Indian Nation, is situated in and around non-Indian towns, for the Utes the town of Ignacio. Many Indian children from the Southern Ute Indian Tribe attend schools run and funded by Ignacio, and thus the local public schools and school districts receive federal funding under the Indian education programs mentioned. For example, Ignacio School District is due to receive $644,880.02 in federal Impact Aid funds this year. Memorandum from Arnold Santistevan to Sam Maynes, attorney, Maynes, Bradford, Shipps & Sheftel, LLP 1 (Aug. 31, 2004). The local school district also received

$75,000, pursuant to Title VII of the Indian Education Act, 20 U.S.C. §§ 7401-7546, to support a reading teacher and counselor who both worked primarily with the district's many Indian children. *Id.*

Moreover, aside from these federal funds, many Indian tribes, including the Southern Ute Tribe and Oneida Indian Nation, have their own school funding programs. These programs have had a significant impact on public schools located in districts surrounding Indian lands. The Southern Ute Tribe contributed over $1.5 million in tribal monies (exclusive of federal and state grants), to assist forty-one programs that will benefit Indians and non-Indians in the local communities during 2002-2004. Southern Ute Tribe, *Tribal Economic Contributions Chart for 2002-2004 (Exclusive of Federal and State Grants)*. Of these programs, the Tribe contributed $51,000 to a Head Start Program for families in Ignacio and over $30,000 of tribal funds to Ignacio Schools and School District. *Id.*

Similarly, the Oneida's Silver Covenant Chain Grants for Local Governments Program provides funding to "[e]ach Municipality and county within the Nation's reservation boundaries, as defined by the 1794 Treaty of Canandaigua . . . ." *Onedia Indian Nation Silver Covenant Chain Grants Fact Sheet* at JA216-17. The grants are conditioned only upon the local governments removing repurchased lands from their tax rolls and maintaining a government to government relationship with the Nation. *Id.* Grant payments are given to school districts directly and are intended to offset any lost taxes by virtue of the Nation's presence. *Id.* at JA217. Since 1996, the Oneidas have given over two million dollars to eight different school districts. *Oneida Economic Impact Study* at JA265. The "[g]rant money is used by most districts to help fund academic programs, provide instructional materials and supplies and also helps to pay teachers' salaries and lower taxes." *Oneida Nation sends more aid to school dists.*,



Rome Daily Sentinel, Aug. 3, 2000, at JA219. So, while it may seem at first glance that a loss of a taxable land base will negatively impact schools in an area, quite the opposite is true. Federal funds available to districts where Indian children attend, combined with contributions made by Tribes to those districts, have a positive impact on educational programs.

**2. Transportation and Roads.**

Tribes participate in the Indian Reservation Roads Program, which is part of the Federal Lands Highway Program. *See* Transp. Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). The program authorized $1.6 billion for the IRR Program for fiscal years 1998-2003. A renewal at a higher figure is currently before Congress. The purpose of the program is stated as:

> to provide safe and adequate transportation and public road access to and within Indian reservations, Indian lands, and communities for Indians and Alaska Natives, visitors, recreational users, resource users, and others, while contributing to economic development, self-determination, and employment of Indians and Alaska Natives.

Indian Reservation Roads Program, 69 Fed. Reg. 43090 (July 19, 2004) (codified at 25 C.F.R. pt. 170).

A good example of a cooperative agreement on transportation is the agreement reached between *amicus* the Pueblo of Acoma and the New Mexico Department of Transportation. *See* Memorandum of Understanding between Pueblo of Acoma and New Mexico Department of Transportation (Feb. 2004). It became clear that the State Highway Department was fully extended in its bonding capacity and could not commit any significant monies to highway repair and improved access at Acoma. The Pueblo of Acoma Tribal Council agreed to provide the monies for a

feasibility study, the necessary first step in the highway redesign process, and set aside an additional $7 million to be one-half of the cost of the needed work on the Interstate Highway. *Id.*

The Pueblo and the State of New Mexico Highway Department have taken on the feasibility study as a joint project and invited the neighboring non-Pueblo communities to take an active role in the process. The construction that ultimately takes place will be a joint project between the State of New Mexico and the Pueblo of Acoma.

## CONCLUSION

This Court was asked to review the decisions below with protestations from Sherrill, the State of New York and other *amici* that the decisions below would bankrupt towns in New York and create impossible jurisdictional conflicts. This is not at all the case. The decisions below should be affirmed, or the petition denied as improvidently granted.

Dated: September 30, 2004.

Respectfully submitted,

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# APPENDIX A

## Economic Contributions of Indian Tribes to the Economy of Washington State[1]

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### Executive Summary

In the fall of 1997, Washington Governor Gary Locke and tribal leadership issued a call for facts to shed light on the relationships between the state and the 27 federally recognized Indian tribes within its borders. The ensuing dialogue, conducted through the Governor's Office of Indian Affairs, resulted in the formation of six working subcommittees composed of tribal representatives to investigate several economic areas. The Economic Study Group developed this report on the tribes' contribution to the state's economy. It is believed to be the first report of its kind in the country, with tribes and a state cooperatively developing a common factual framework. From this foundation, the tribes and the state can better address the many economic issues of importance facing Indian Country in Washington State.

The authors of this report based their conclusions primarily on official data from the 23 participating tribes and the state. These sources included the state's Office of Financial Management-Forecasting Division, and the Employment Security Department. Equally important were the tribes' own official

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[1] All figures and photographs have been omitted due to space and formatting limitations.

books and records, including tax returns and reports filed with the Internal Revenue Service and with the state. Never before has such detailed information been released by the tribes. It is presented here in aggregate form to protect tribal privacy. The authors also drew upon supplemental information for all 27 tribes from federal agencies such as the Bureau of Indian Affairs, the Indian Health Service, the U.S. Department of Education, and the U.S. Bureau of the Census.

Because many tribes were reluctant to share confidential and proprietary information with the state, they and the state agreed upon a third-party contractor to review tribal data and to present it only in aggregate form. Tiller Research, Inc., fulfilled this role, with assistance from Chase Economics. The contractors signed strict confidentiality agreements with the tribes and with the state concerning the use of data for this report.

These findings are significant both in their scope and their implications. This report dispels the common misperception that Washington's Indian reservations are an economic "drag" on the state. Far from it. Consider the following:

Washington has 27 federally recognized Indian tribes with a combined population of about 91,000.

Washington tribes contribute $1 billion annually to the state's overall economy.

Tribal enterprises in 1997 spent $865.8 million for supplies, equipment and services.

In 1997, the tribal governments paid an estimated $51.3 million in federal employment/payroll-related taxes.

The tribes paid an estimated $5.3 million in state employment/payroll-related taxes in 1997.

Tribal enterprises currently employ 14,375 Washington citizens full time, including non-tribal employees.

More than half of these jobs are in the services sector.



Average annual wages for tribal employment amounted to $18,800. This is about 40 percent lower than the statewide average of $32,400.

Finally, readers should note that this report reflects the conclusions of the authors. It should not be construed as representing the official position of the State of Washington or of any federally recognized Indian tribe located within the state's borders.

## Introduction

### Background of Study

Finding specific information about the economic contribution of Washington's 27 federally recognized Indian tribes to the state's economy has been frustratingly difficult for years. As state-level policy makers and tribal leaders regularly interact on a variety of social and economic issues, this lack of data has hampered sound decision making. In response to this situation, Washington State Governor Gary Locke and tribal leaders undertook an initiative in 1997 to determine the role played by tribal entities and reservation lands in the economy of Washington. Consequently, the Governor's Office of Indian Affairs began collaborating with tribal representatives to provide a clearer picture of the reservation economies in the state and to illuminate the relationship of those reservations to the larger state economy. Two overall goals framed the discussion. The first was to begin a dialogue between tribal leadership and the state on a government-to-government basis to address economic vitality in Indian Country to develop solutions to economic problems. The second goal was to provide the state with a greater understanding about the obstacles and unique challenges tribes face in developing their limited resources to promote economic well being.

After a series of initial meetings, the state and tribes jointly adopted the *Tribal Economic Vitality Initiative* (*TEVI*). It

identified six issues: (1) Economic Study Plan, (2) Financing, (3) Gaming, (4) Taxation, (5) Tribal Employment Rights Organization, and (6) Tourism as areas of critical importance to the Indian tribes. The participants also established six subcommittees, one for each issue.

With the Governor's support, the Governor's Office of Indian Affairs recognized the need for taking meaningful action to maintain the trust and confidence of the tribal governments. In response, the Economic Study Planning Group recognized the critical importance of providing the tribes with an accurate portrait of their collective economic contributions to the state's economy. This information would reverse the longstanding misconception that Indian tribes contributed very little—in terms of employment, earnings, and tax revenues—to the state's economy. The tribes had always contended otherwise. Unfortunately, for years they could only point to piecemeal anecdotal evidence with little documentation of their economic impact.

To dispel this false image and clarify once and for all their economic role in Washington State, the tribes embraced this research project, even though it meant sharing information long held in the strictest confidence within the respective tribes. They recognized that this report would finally give them the accurate statistical data they needed to substantiate their claims.

Since the effort to develop this report began, a national trend has emerged among Indian tribes recognizing the need to determine their economic impacts on state, regional, and national economies using proven methods and studies. By working cooperatively on this study, Washington tribes and the Governor's Office have broken new ground in this area, taking the lead on an issue of national importance. The results will benefit all citizens of Washington State.



## Historical Considerations

Though peripheral to the scope of this study, a historical perspective on government policy toward Indian tribes should frame any consideration of their impact on the State of Washington's economy. In particular, all the state's tribes made enormous; though involuntary, initial capital contributions through the land cessions of the Nineteenth Century. (*See* Appendix I) Furthermore, more than a century of failed and now thoroughly repudiated federal Indian policies has dramatically changed the landscape of many treaty and executive order reservations. As a result, the present-day Indian reservations in Washington are often a vastly different territory than the tracts originally "reserved" by the treaty-making tribes throughout the state.

In the late Nineteenth and much of the early Twentieth Century, only tribal landowners were subjected to unilateral and forced takings of lands. The federal government deemed those lands to be surplus to the tribes' needs. Through the Dawes Act of 1887, which opened up large portions of the tribes' reservations to homesteading and ownership by non-Indians without tribal consent, the federal government simply took the prime productive land of many reservations out of Indian ownership altogether.

This same policy fostered fractionated land ownership, diluting the value of tribal lands as successive generations inherited Indian "allotments" of their own land. The details of ownership often became too complex to sort out. Even today, prime agricultural land in the Yakima Valley sometimes lies fallow or is farmed in trespass because the local Indian agency cannot maintain ownership and leasing records. In other cases, they cannot locate a sufficient number of the Indian owners to execute a valid lease.

Despite the Congressional repudiation of the allotment policy in the 1930's, government policy continued to inhibit the tribes' contribution to the state economy. Federal reclamation

projects diverted precious water to neighboring, non-tribal lands. In other cases, the massive hydroelectric power facilities constructed during the Great Depression inundated hundreds of thousands of acres of reservation lands and off-reservation treaty fishing sites. Finally, during the post-war years, the federal policy of "relocation" transplanted many Indian families virtually by force from their reservation homelands to the state's inner cities. Meanwhile, three major industries—fishing, forestry, and agriculture—helped drive Washington's economy by economic activity generated by those lands the tribes have retained for their own use—that is, the present-day Indian reservations in the State of Washington.

Although these historical factors have directly shaped the present economic status of Indian reservations in Washington, this report makes no attempt to quantify or assign monetary value to these huge and often-overlooked contributions of land and resources to the state's economic engine. Nor does this report analyze the costs or effects of these failed policies. Instead, it provides a snapshot of the economic role Indian reservations play at the end of the Twentieth Century. The timeframe is significant. In great measure, the efforts of tribal leaders within the last twenty years have driven the economic indicators that characterize Washington's Indian reservations today. Thus, the following pages focus on assessing the economic and fiscal contribution of Indian tribes to Washington State's economy.

## Approach of Analysis

To assess the economic and fiscal contribution of Indian tribes to the State of Washington, researchers asked such questions as, how important is Indian Country to the state's economy? What are the extent and level of economic activities engaged in by Washington Indian tribes? How diversified is the Indian country economy compared with Washington State?



Researchers collected the information for assessing the economic and fiscal contribution of the tribes from a number of tribal and governmental sources. The governmental sources pertained to all 27 tribes collectively; they included several Washington State agencies (*e.g.*, Employment Security Department, Department of Revenue, Department of Fish and Wildlife, Department of Natural Resources) and various federal agencies.

Researchers gathered, from 23 of the 27 participating Washington tribes, (*see* Appendix II) information about revenues and expenditures of tribal governments and enterprises owned and managed by tribes, employment and wages, and taxes paid for the most recent calendar year of 1997. Note that this analysis considered only that economic activity conducted by the tribes themselves. It excluded businesses owned and operated by Indian tribal members. Most of the tribal-owned enterprises operate on reservation land, with a few exceptions, particularly some commercial and casino establishments. Furthermore, tribal governments and enterprises do not employ exclusively Native Americans—a significant share of tribal employment is non-Indian.

Table 2

Population by Race and Hispanic Origin in Washington State, Actual and Projected

| Race/ Ethnic | 1990 | 1994 | 1997 | 2005 |
|---|---|---|---|---|
| White | 4,225,313 | 4,517,668 | 4,679,094 | 5,115,347 |
| Black | 146,350 | 168,519 | 183,306 | 190,484 |
| Indian | 76,478 | 85,956 | 90,857 | 103,125 |
| Asian | 203,981 | 273,553 | 313,564 | 410,372 |
| Hispanic | 214,570 | 288,703 | 339,978 | 438,415 |
| Total | 4,866,692 | 5,334,399 | 5,606,799 | 6,257,743 |

| Race/ Ethnic | 2015 | 2025 | Annual Percent Change 1990-97 | 2005-25 |
|---|---|---|---|---|
| White | 5,569,727 | 5,940,106 | 1.5% | 0.8% |
| Black | 217,453 | 243,912 | 3.6% | 1.4% |
| Indian | 120,320 | 136,720 | 2.7% | 1.6% |
| Asian | 544,480 | 688,859 | 7.7% | 3.4% |
| Hispanic | 606,181 | 798,104 | 8.3% | 4.1% |
| Total | 7,058,161 | 7,807,701 | 2.2% | 1.2% |

Sources: Washington State, Office of Financial Management, Forecasting Division.; U.S. Department of Commerce, Bureau of the Census.

Indian Tribes in Washington State

## Demographics

In 1997, Washington State ranked fifth among all states in American Indian population. The number of American Indians in Washington is growing at a faster rate than the national Indian population. (Table 3). Within Washington State, over half of the American Indians live in the urbanized Puget Sound region (Tables 4 and 5). However, as a percentage of total regional population, American Indians are relatively more concentrated in the Eastern and Western Washington regions, which are predominantly rural. Thus Ferry, Okanogan, Yakima, and Stevens counties of Eastern Washington have the greatest share of American Indians as a percentage of the overall population. More than 5 percent of these counties' combined total 1998 population is American Indian. In contrast, King County has the most American Indian residents in the state (18,000), yet they represent just 1.1 percent of the overall county population.



The American Indian population in Washington State has been growing rapidly. According to the 1997 state estimates, the American Indian population increased to 90,857 people, 16% more than the 1990 population census. Some of this increase can be attributed to more people identifying themselves as Indians on the census; nevertheless, natural population increase accounts for much of the growth. Based on this rapid rate of growth, the Census Bureau estimates that the American Indian population residing in Washington State will reach 136,720 people representing 1.6 percent of the total state population by the year 2025 (Table 2).

Table 3. Leading States in American Indian Population, 1990 and 1997

| State | 1990 | 1997 | % Change Population | Share of '97 Total Indian | State Rank of Am. Indian Share |
|---|---|---|---|---|---|
| CA | 285,270 | 306,690 | 7.5% | 1.0% | 16 |
| OK | 257,794 | 260,029 | 0.9% | 7.8% | 4 |
| AZ | 214,433 | 255,463 | 19.1% | 5.6% | 6 |
| NM | 137,625 | 158,036 | 14.8% | 9.1% | 2 |
| WA | 87,259 | 100,309 | 15.0% | 1.8% | 9 |
| AK | 86,252 | 97,098 | 12.6% | 15.9% | 1 |
| NC | 80,825 | 95,398 | 18.0% | 1.3% | 14 |
| TX | 72,343 | 93,343 | 29.0% | 0.5% | 25 |
| NY | 66,337 | 74,483 | 12.3% | 0.4% | 28 |
| MI | 57,654 | 59,678 | 3.5% | 0.6% | 21 |
| U.S. Total | 3,944,974 | 4,421,401 | 12.4% | 0.9% | NA |

Note: Ranking based on number of American Indians in 1997. Source: U.S. Department of Commerce, Bureau of the Census

Table 4. Resident Indian Population on Washington State Reservations for 1995 and Tribal Enrollment figures for 1997-1998

| Reservation | BIA Total/ 1995 | Tribal Enrollment/1997-98 |
|---|---|---|
| **Western Washington Region** | | |
| Chehalis Confederated Tribes | 871 | 525 |
| Hoh Tribe * | 97 | 147 |
| Jamestown S'Klallam Tribe | 641 | 230 |
| Lower Elwha Klallam Tribe | 1,149 | 750 |
| Makah Tribe | 1,753 | 2,300 |
| Quileute Tribe | 785 | 706 |
| Quinault Nation | 2,975 | 2,217 |
| Shoalwater Bay Tribe | 743 | 150 |
| Skokomish Tribe | 1,333 | 820 |
| Squaxin Island Tribe | 515 | 643 |
| *Western Washington Total* | 10,862 | 8,488 |
| **Puget Sound Region** | | |
| Lummi Nation | 4,648 | 3,519 |
| Muckleshoot Tribe | 3,521 | 1,170 |
| Nisqually Tribe | 2,905 | 500 |
| Nooksack Tribe | 820 | 1,341 |
| Port Gamble S'Klallam Tribe | 753 | 837 |
| Puyallup Tribe | 14,282 | 2,219 |
| Samish Nation * | NA | NA |
| Sauk-Suiattle Tribe | 120 | 237 |
| Stillaguamish Tribe | 1,476 | 176 |
| Suquamish Tribe | 1,032 | 665 |
| Swinomish Tribe | 959 | 753 |
| The Tulalip Tribes | 4,549 | 2,934 |
| Upper Skagit Tribe * | 610 | 504 |
| *Puget Sound Total* | 35,675 | 14,855 |



| Reservation | BIA Total/ 1995 | Tribal Enrollment/1997-98 |
|---|---|---|
| **Eastern Washington Region** | | |
| Colville Confederated Tribes | 4,929 | 8,404 |
| Kalispel Tribe | 170 | 258 |
| Spokane Tribe * | 1,416 | 2,153 |
| Yakama Nation | 15,968 | 8,870 |
| *Eastern Washington Total* | 22,483 | 19,685 |
| *Washington State Total* | 69,020 | 43,028 |

Source: USDI, Bureau of Indian Affairs, 1995. Resident pop. figures usually include non-tribal members and tribal enroll-ments include all tribal members irrespective of their legal residence. Many tribal enrolled members live off the reservations and out of the state. Tribal enrollment figures are based on 1997-98 data from individual Indian tribes and the Indian Health Service, except for tribes marked with an asterik (non-participating tribes); those figures are from the BIA, 1995.

Table 5
American Indian Population in Washington State

| Region | 1990 | 1992 | 1994 | 1997 | % Change | Share of Total 1997 Population |
|---|---|---|---|---|---|---|
| Eastern Washington | 23,667 | 24,947 | 26,254 | 27,440 | 15.9% | 2.2% |
| Western Washington | 11,694 | 13,030 | 13,793 | 15,117 | 29.3% | 2.1% |
| PugetSound | 41,117 | 44,051 | 45,909 | 48,300 | 17.5% | 1.3% |
| Washington State, Total | 76,478 | 82,028 | 85,956 | 90,857 | 18.8% | 1.6% |

Sources: Washington State Office of Financial Management, Forecasting Division Notes: Ranking based on number of American Indians in 1997. U.S. Bureau of Census includes American Indians, non-Hispanic and Hispanic in their definition. Other state population tables include only American Indian, non-Hispanic.

These economically diverse tribal-owned enterprises fall into the following categories:

- traditional natural resource production;
- construction;
- wholesale and retail trade;
- finance, insurance, & real estate;
- services;
- gaming; and
- government.

Each is discussed in detail on the following pages.

## Economic Activities

Historically, the nation has viewed Indian reservations as a burden on the national treasury and on the economies of the states where they are located. This view overlooks the enormous "capital contributions" these tribes made to state economies through the land cessions of the last century. Such a perception also reflects the outdated belief that reservations are "pockets of poverty" and a blight on the economic landscape. While that picture might have been accurate through much of the Twentieth Century, nothing could be further from the truth today, as this report demonstrates. In fact, tribes' collective annual contribution of nearly $1 billion to the Washington economy suggests a radical new image for the economic vitality of Indians tribes.

Although Indian tribes are considered sovereign nations, they are intricately connected to the Washington State economy. Indian tribes in Washington engage in various commercial, industrial, and natural resource activities that create jobs and personal income for Indians and non-Indians alike throughout the state.



## Natural Resources

Historically, natural resources have been a mainstay of the state's economy. Agriculture production and food processing, logging and processing forest products, and fishing and processing of fish and shellfish have been among the state's leading industries. In 1997, these natural resource-related industries altogether employed 243,000 workers with total labor earnings of $6.2 billion. Combined, these industries account for a 7 percent share of total employment in Washington State.

Among Washington Indian tribes, of course, fishing and hunting and gathering of natural resources have been central activities for thousands of years. They remain important to tribes for subsistence, as well as economic and ceremonial purposes. The tribes have traded fish and shellfish with the non-Indian population since the first white settlers arrived in the region 150 years ago.

The importance of fishing continues. Over the last few decades, U.S. federal court decisions have settled state-tribal disputes over the rights to the steelhead and salmon harvested in Washington waters (*e.g.*, major rivers, Puget Sound and ocean waters immediately off the coast). Consequently, the tribes have federally assured treaty rights, older than the state itself, to approximately half of the annual salmon harvest. The tribes won similar allotments for other species, including Pacific whiting, sablefish, rockfish, albacore, halibut, and sea urchin. A recent court ruling has resulted in a similar allocation of shellfish for Indian tribes in Washington.

Today, fish and shellfish harvested by Washington's Indian tribes are in great demand, in both domestic and foreign markets. Logs harvested from tribal lands have become an important economic cornerstone for a number of Washington Indian tribes. Timber harvest and salmon fishing by tribes, for instance, have been valued at $71.2 million and $6.8 million,

respectively for 1997 (Figures 1 and 2). These activities provide employment and earnings for a significant number of Indians in Washington.

Although fish and timber are among the tribes' most valuable resources for economic development, tribal governments have made relatively few ventures into value-added processing of timber and fish. Most of the logs and fish harvested by Indians are marketed unprocessed to outside buyers, includeing foreign customers. Moreover, tribal-owned logging and fishing enterprises export a significant share of their raw logs and fresh and frozen fish to customers outside the state and nation.

The lack of investment in value-added, resource-based industries highlights many of the significant barriers to economic development in Indian Country. Several prerequisites to development and the long-term sustainability of economic activities must be set in place.

They include:

- policies that clearly delineate the roles and responsibilities of the public and private sectors;
- access to capital financing on appropriate terms and conditions;
- adequate social and physical infrastructure to support activities; and
- a legal system that both facilitates investment and protects the interests of all parties engaged in financial or commercial transactions.

The Washington fishing industry is diverse in both user groups and range of species. User groups, for instance, include both commercial fishermen and sport/recreational anglers. Commercial groups are further divided into tribal and non-treaty groups. Each of these groups is allocated allowable catch limits for each species by fishery management councils



(*e.g.*, Pacific Fishery Management Council, Northwest Indian Fisheries Commission, Washington Department of Fish & Wildlife).

With all of the federally recognized Indian tribes living on either major rivers or coastal waters of Washington, fisheries remain critically important to tribal economies. Tribes are major players within the state of Washington fishing industry, where total commercial landings were valued at $139.6 million in 1997. They are also heavily involved in fisheries management. As sovereign governments, each tribe regulates and coordinates its own fisheries management program surrounding six species of salmon, halibut, shellfish, and other marine species. Tribal fisheries management includes harvest management, enhancement, habitat protection, and enforcement. For instance, many Puget Sound and costal tribes have enhancement programs; in 1997, tribal hatcheries released more than 39 million salmon, benefiting Indian and non-Indian, commercial and sport fishermen in the state.

Besides salmon, important Indian fisheries include halibut, sablefish, dungeness crabs, sea cucumbers, urchins, shrimp, clams, geoduck, mussels, and oysters. Unfortunately, an alarming decline in many Washington's fish stocks, particularly salmon, has hurt some tribal economies. To compensate for this loss, a number of tribes have turn to harvesting shellfish as a major economic resource (Figure 3). In recent years, the value of tribal shellfish harvest has outpaced that of salmon.

## Construction

Residential and non-residential construction activity in Indian Country is directly related to increased population and new economic activity. By and large, most tribes do not have residential construction enterprises; the few tribal-owned construction enterprises are primarily engaged in residential construction and repair funded by the U.S. Department of

Housing and Urban Development. Unfortunately, information is unavailable on the number and value housing starts completed on Washington tribal lands.

### Wholesale and retail trade

Wholesale and retail trade sectors comprise two of the nation's largest industries—one of every five employed people works in these trade industries. Demographic and economic factors, including population growth, household formation, and consumer spending drive retail trade sales.

Washington tribes own a number of retail trade enterprises, but they lack the broad array of retail offerings found in many comparable non-Indian communities. Tribal-owned enterprises like smoke shops, service stations, and trading posts primarily sell convenience goods to tribal members and non-Indians. Most retail sales and services in Washington are conducted off reservations at non-Indian establishments, including border towns that largely owe their livelihoods to Indian patronage.

### Finance, insurance, and real estate

The nation's financial services group includes banks and savings and loans (depository institutions); credit agencies, mortgage bankers and brokers (nondepository institutions); security and commodity brokers; insurance carriers, agents, and brokers; real estate developers and agents; and holding and other investment offices. In Washington, most tribal-owned finance, insurance, and real estate enterprises provide housing assistance and administer housing programs funded by the U.S. Department of Housing and Urban Development.

### Gaming

In 1988, the U.S. Congress passed the Indian Gaming Regulatory Act (IGRA) which, in effect, authorized casino gaming on Indian reservations and provided a regulatory



framework and oversight body for the industry in the form of the National Indian Gaming Commission (NIGC). In addition, the act was intended to promote a viable economic base for tribal government programs and operations, as well as tribal economic development, self-sufficiency, and strong tribal governments. Indian gaming was divided into three classes for purposes of licensing and regulation: Class I covers charitable and social gaming for nominal prizes; Class II includes bingo, punch-boards, and pull-tabs; and Class III facilities include casinos, high-stakes bingo, slot machines, and all other commercial forms of gambling. As of 1998, twelve of the 27 federally recognized tribes in Washington operate gaming facilities on and off reservation. The off reservation sites are on Indian trust lands.

In a relatively few years, gaming has changed the economic landscape for some of these Indian tribes. Since 1988, this reservation-based industry has experienced explosive growth. Across Indian country in Washington, gaming has become the leading employer. A number of tribal-owned casinos have, in fact, become the largest employers within their respective communities.

### Services

The extensive services sector is very heterogeneous. Most service industries are classified into two groups: producer services and consumer services. Producer services are generally provided to other service and manufacturing firms, as opposed to consumer services (*e.g.*, personal services, auto repair), which typically serve consumers directly.

Additionally, these producer services are generally driven by external demand—that is, so-called "export sales."

In Washington's Indian Country, tribal-owned enterprises are largely engaged in providing consumer services such as hotels and lodging, health clinics, schools, social services, and amusement and recreation. The latter category, notably

gaming activities like bingo halls and casinos, has been the principal growth engine for many Indian tribes.

## Government

Tribal governments are significant economic factors within Indian country. In addition to carrying out their respective governmental administrative functions, tribes own and manage enterprises across the wide spectrum of economic activity.

## Employment & Wages

### Employment

In 1997, tribal-owned enterprises employed 14,375 workers with labor earnings of $270 million. In addition, quasi-government and private organizations whose principal clientele are Washington Indian tribes employ another 360 people with labor earnings of $9 million.

Combined, tribal and related employment represents about one-half of one percent of Washington's 1997 employment of 2.5 million wage and salaried workers.

Most of the workers in tribal-owned enterprises are full-time employees (Figure 4). Although comparative information is unavailable at the state level, this share of full-time versus part-time workers is consistent with national workforce statistics. Figure 4 also illustrates that a significant share of tribal-owned enterprise employees are non-Indian. In aggregate, approximately 4 out of every 10 workers employed by tribal-owned enterprises are non-Indian. Although the percentages vary considerably from one tribe to another, the highest share of non-Indians is employed within the casino and other gaming sector. In contrast, tribal government employs the highest share of tribal members and other Indians.



Employment in tribal-owned enterprises is concentrated in total services (52 percent), which is dominated by casino and other gaming, and health services (Figure 5). Other sectors where tribes' economic activity is concentrated are government (29 percent of total employment) and natural resources (8 percent). Compared with the state, tribal employment is less concentrated in manufacturing (6 percent); retail and wholesale trade (2 percent); construction (0.3 percent); transportation, communications, and utilities (1 percent); and other services (8 percent).

With respect to employment in specific regions, over half of the tribes' total is concentrated in the urbanized Puget Sound area (Figure 6). The share of full-time compared with part-time employees varies between regions as does the shares of tribal members, other Indians, and non-Indian employees (Figure 7).

Industry concentrations of tribal-owned enterprise employment vary by region (Figure 8). Not surprising, the more populous Puget Sound has greater employment concentrations of casino and other gaming, tribal government, health services, retail trade, and construction workers. Employment in natural resource-oriented sectors (both production and processing) is more concentrated in the Eastern and Western Washington regions.

### Wages

In 1997, labor earnings of tribal-owned enterprise workers totaled $270 million. Average 1997 wages per worker amounted to $18,800, approximately 40 percent lower than the statewide average of $32,400. Funding sources for these wages come primarily from tribal government revenues, followed by federal government allocations, and a small portion from state government grants.

For those employed by tribal-owned enterprises, average wages vary by both sector and region (Table 6). In general,

tribal-owned enterprise workers earn less than their counterpart statewide workers. There are, of course, exceptions, particularly in gaming.

This total payroll of $270 million supports an annual contribution of $5.4 million to the state unemployment insurance fund. In addition, these wages and salaries generate some $51 million in federal income and social security taxes. Besides the salaries and wages paid by the tribes themselves, the federal Bureau of Indian.



Table 6. Average Wages by Sector and Region for Tribal Owned Enterprises-1997.

Tribal-owned Enterprises

| Sector | W. WA | Puget Sound | E. WA | State-wide Tribal-owned | State-wide |
|---|---|---|---|---|---|
| Total | $20,317 | $20,445 | $14,815 | $18,783 | $31,073 |
| Agriculture & farming | NA | NA | $17,215 | $17,215 | $16,058 |
| Forestry | $4,197 | $9,531 | $24,300 | $16,107 | $20,091 |
| Fishing | $12,284 | $8,129 | $23,748 | $13,007 | $50,759 |
| Construction | $24,650 | $32,776 | NA | $31,124 | $33,513 |
| Manufacturing | NA | NA | NA | $6,031 | $41,128 |
| Transport, corn. & util. | $18,310 | $17,495 | $20,704 | $18,810 | $39,499 |
| Retail trade | $13,210 | $13,761 | $11,357 | $13,043 | $17,588 |
| Finance, insurance & real estate | $26,279 | $29,634 | $18,326 | $21,665 | $37,884 |
| Other services | $12,574 | $17,244 | $15,991 | $16,420 | $31,623 |
| Health services | $65,368 | $37,098 | $17,941 | $31,016 | $32,378 |
| Casino & other gaming | $19,185 | $20,896 | $20,438 | $20,558 | $15,858 |
| Government | $29,217 | $19,699 | $12,300 | $19,214 | $30,674 |

Notes: Statewide refers to average wages per wage & salary worker in Washington State; NA refers to not available.

Sources: Washington State Employment Security Department, U.S. Bureau of Economic Analysis, Individual Tribes.

Affairs and the Indian Health Service spend some $140 million annually in the State of Washington as a direct result of the presence of these federally recognized Indian tribes. These two agencies employ another 100 workers in the state. Related quasi-government agencies (*e.g.*, South Puget Sound Inter-tribal Housing Authority, Northwest Indian Fisheries Commission) employ another 360 workers with wages of $9 million.

### Business Income and Expenditures

Tribal-owned enterprises also contribute to the growth of income and jobs within the statewide economy because of their substantial expenditures for supplies, materials, utilities, goods and services. In 1997, business income for all tribal enterprises in Washington amounted to an estimated $1.003 billion (Figure 10). Although a significant share of total tribal-owned enterprise revenues come from gaming operations, a majority of revenues come from non-gaming operations (*e.g.*, natural resources, tribal government, other services) (Figure 11).

Tribal-owned enterprises spent an estimated $865.8 million statewide for supplies, equipment and services. Given that most reservation economies are underdeveloped (*e.g.*, not offering the full complement of necessary goods and services in support of operating a tribal enterprise), a considerable portion of these expenditures are made off the reservation. Hence, these expenditures support additional in-state activity (in the form of added employment and income) and, in particular, surrounding non-Indian communities.

While the authors of this report have not performed a detailed multiplier analysis, the total contribution of tribal-owned enterprises of the overall state economy is signifycantly greater than the sum of their expenditures for wages, goods, and services. Multiplier effects essentially measure the full economic impact of tribal-owned enterprises on the local



and state economy by assessing how much of each dollar spent at the tribal-owned enterprise is re-spent in the surrounding economy. For instance, the economic impact of an enterprise on the state is much greater if it purchases capital goods (*e.g.*, construction materials, computers), supplies, and services from in-state vendors, than if it imports materials from outside the state. Therefore, multiplier effects take the dollars counted as revenues of tribal-owned enterprises and measure how much additional in-state economic activity (in the form of sales, employment, and wages and salaries) is generated by these expenditures.

In sum, tribal-owned enterprises are the source of substantial employment and income opportunities for both Indian and non-Indian residents of Washington State.

### Federal Government-Tribal Government Transactions

Nearly all federal government departments in Washington State have specific programs, activities, or staff functions established to deal with Indian tribal governments. Five departments spend large portions of their budgets on transactions with Indian tribes. These are the Department of the Interior (Bureau of Indian Affairs), the Department of Housing and Urban Development (Office of Indian Programs), the Department of Health and Human Services (Indian Health Service), the Department of Labor, and the Department of Education (Office of Indian Education). Total statewide expenditures by each department are shown in Table 7. Expenditures by each department are shown for personnel directly related to Indian tribal government transactions.

### Fiscal Contribution of Indian Tribal Governments in Washington

As owners of economic enterprises and employers, tribal governments pay federal, state and local taxes. Estimated Federal employment/payroll-related taxes (social security,

medical; unemployment) paid by tribal governments in 1997 were $51.3 million. In addition, state employment/payroll-related taxes paid by tribes in 1997 were estimated at $5.3 million.

Table 7. Federal Government-Tribal Government Transactions in Washington State for 1997

| | DOI/BIA | HHS/IHS | DOE/OIE | Total |
|---|---|---|---|---|
| Total Expenditures | $118,561,000 | $30,100,000 | $11,730,000 | $160,391,000 |
| Salary & wages | $39,759,000 | $22,990,000 | NA | $62,749,000 |
| Other payments | $78,802,000 | $7,110,000 | NA | $85,912,000 |

Sources: U.S. Department of Commerce, Bureau of Census. *Federal Expenditures by State for Fiscal Year 1997;* Individual Tribes

Level of diversification of Indian country economy

Until recently, the emergence of viable self-sustaining reservation economies has been only a remote possibility. Dependent upon natural resources, most tribal economies had stabilized with significant levels of unemployment, limited investment, and shortages of tribal government revenues. The recent explosion in Indian gaming has been a boon for Indian country in creating family-wage jobs, increasing non-natural resource economic activity, and generating revenues both on and off the reservation.

Given the requirements of the Indian Gaming Regulatory Act, all revenues from tribal gaming operations are to be used solely for governmental or charitable purposes. Similar to state governments and the use of funds from state lotteries, profits from Indian tribal gaming operations are being spent locally to build houses, schools, roads and sewer and water systems; to underwrite the costs of health care and education for their people; and to further develop a strong,



diverse economic base on tribal lands. The Tulalip and Muckleshoot Tribes, for instance, are using gaming revenues to fund long-term economic development projects that will further enhance their economic health, and that will, in turn, generate sustainable jobs and revenues within the state.

In Washington State, as elsewhere, casino gaming enterprises have resulted in a number of tribes—for instance, the Colville, Muckleshoot, Quinault, Spokane, Tulalip, and Yakama Tribes—becoming the leading employers in their respective areas. In fact, many gaming enterprises have become an important source of employment for non-Indians residing in surrounding communities. In other words, these tribal enterprises have been major contributors to the alleviation of severe unemployment, both on and off reservation. With substantial numbers of Indians becoming employed in these enterprises, there has been a net reduction on reliance on governmentally-provided services. In particular, tribal-owned gaming enterprises have successfully reduced their economic reliance on non-tribal governments for social assistance.

Washington Tribal Economies in Perspective—The Gaming Sector

In recent years a new myth has arisen to replace in many quarters the old myth that Indian tribes and their reservations are simply economic black holes that vacuum scarce public resources into their orbit, and never change. The new myth is that gaming has transformed all Indian tribes into immensely wealthy baronies somehow outside the reach of law, immune to the basic laws of economics, and no longer entitled to either federal programs that are available to all American citizens, or even to those programs serving federally recognized Indians because of their status as Indians. This new myth is as fundamentally misplaced as the old shibboleths.

In the State of Washington, 19 of the 27 tribes have gaming compacts with the state. Of those 19, twelve operate casinos. It is true that these Indian tribes in Washington have turned, like governments everywhere throughout the world, to gaming as a source of revenue for badly needed programs to serve their people. It is also true that gaming has fueled an economic boom for some tribes, primarily those fortunate enough to be located close to major metropolitan areas and transportation corridors. Today, gaming generates some 46% of all tribal revenues in the State, and provides employment for more than one-half of the more than 14,000 tribal employees in the state.

It is emphatically not true, however, that all the tribes in the state have shared in this relatively new form of prosperity. Eight of these tribes have no gaming enterprise at all, and at least one tribal gaming operation has resulted in significant losses to the sponsoring tribe. It is becoming increasingly clear that Indian gaming operations are, in fact, subject to certain immutable principles of economics. These enterprises have not flourished where there is simply not a sufficient market for the services offered, and there is a limit to the level of gaming that the state's citizens and visitors can sustain by their participation. Federal legislation and recent decisions by the electorate also make it clear that Indian gaming is by no means beyond the reach of the political processes of the federal and state governments.

Finally it is also becoming clear that, while Indian gaming has been a significant catalyst in the long-deferred development of some reservation economies and infra-structure, this activity certainly does not insulate tribes from the need for continuing governmental assistance programs—any more than state lotteries eliminate the need for continued federal assistance to the states for education, road construction, etc.

At this point in the history of this quite new tribal enterprise, it appears that gaming has provided some fortunate



tribes with opportunities never before available to address long-standing needs of their communities, and to provide employment for far more of their neighbors than for their own members. This phenomenon appears to be vindicating the old wisdom that a rising tide, indeed, lifts all boats.

It is worth repeating that before Indian gaming, the economic profile across Washington's Indian Country was summarized by a set of well-known statistics: reservations had the highest unemployment rates, highest poverty rates, lowest per capita income, and so on.

Indian tribal governments have sought to develop their tribal economies. Yet they still face a lack of access to capital, markets, skilled labor forces, and management capabilities, to name but a few of the barriers. While this report is not intended to provide a detailed analysis of the impact of gaming on Washington's Indian economies, the data show it has made a positive contribution. Standing against this gaming-supported growth trend is the daunting amount of "catch-up" Indian tribes face. They must overcome high unemployment rates, lack of infrastructure, poor housing, and low levels of educational attainment in comparison to national averages. So, while the picture shows progress, the tribes continue to lag behind the rest of Washington s citizens.

## Summary and Conclusions

This report represents a successful first-time effort to describe the nature of economic activity on the 27 federally recognized Indian reservations in the State of Washington and to quantify their contribution to the overall state economy. Far from depicting a monolithic Indian Country economy, the information in this study underscores differences among tribal enterprises in the three defined regions of the state and between the rural and urban areas.

Whether the measurement is in direct employment of both Indians and non-Indians, wages, expenditures, or state and federal tax payments, tribal enterprises clearly have made their mark on Washington's economy. Despite the ascending economic value of gaming, tribal enterprises are a diverse group, with interests spanning several industries and market sectors and with varying impact on the communities around them.

Although gaming contributes less than half the gross revenues earned by Washington's tribal enterprises, nonetheless, it has made a tremendous impact on both the tribes and the state at large. With $440 million in annual revenues, gaming is by far the largest single industry in Washington's Indian Country. Yet, gaming alone has not—perhaps cannot—solve every economic ill on the state's reservations. In fact, this report emphasizes the need to continue diversifying tribal businesses, to eliminate the wage discrepancy between Indians and non-Indians, and to eliminate the barriers that inhibit economic development on the reservations. As the population trends indicate, the number of Indians in Washington is climbing steadily, a fact that guarantees the issues related to Indian economic development will continue to have statewide impact.

The authors of this report hope it will help frame future discussion about Indian economies among the tribes and between them and the state at large. These conversations might center on topics such as how to develop new enterprises for the value-added processing of timber and fish, for example, or how to bring new, more diversified economic activities to the remote, rural reservations in Washington. Only with reliable information and clearly established benchmarks can the tribes develop valid economic forecasts, analyses of trends, and projections of workforce needs. Future studies such as this will help ensure the tribes have the



data they need to compete in the state's—and the nation's, and the world's—information-driven economy.

This is an historic report beyond the specific usefulness of its findings. For the first time in the nation's history, Indian tribes and a state have cooperated using primary fiscal data to determine the economic contributions made by tribal governments and their enterprises. Tribes can now abandon anecdotal and piecemeal information in favor of valid figures in support of their long held assertions of economic importance to the state. This report should demonstrate to the tribes the value of tracking their economies, measuring how their economies contribute to the overall health of the state, and conducting studies annually to continuously affirm their economic contribution. For the state, this study can be considered an educational blueprint for a cooperative working partnership with Washington's Indian tribes, and should serve as an empirical basis for refuting the "myths" that have historically affected the relationship between the State of Washington and the Indian tribes within its borders.

## Appendix I—List of Historic and Current Reservation Acreages of Washington Indian Tribes

### Tribal Lands and Reservations in Washington

| Abbreviated Tribal Name | Size of Tribal Land | Treaty or Reservation Instrument |
|---|---|---|
| Chehalis | 4,215 acres | Executive Order, 1886 |
| Colville | 1.4 million acres | Executive Order, 1872 |
| Elwha Klallam | 443 acres | Indian Reorganization Act, 1934 |
| Hoh | 443 acres | Executive Order, 1893; based on Treaty of Quinault, 1855 |
| Jamestown Klallam | 210 acres | Trust land, purchased 1874 |
| Kalispel | 4,600 acres | Executive Order, 1914 |
| Lummi | 13,500 acres | Executive Order, 1855 |
| Makah | 44 square miles | Makah Treaty, 1855; after 1974 includes administration of Ozette Reservation (one acre) |
| Moses Columbia | Terminated | Executive Order, 1879; terminated 1886 |
| Muckleshoot | 3,600 acres | Executive Order, 1874, based on Treaty of Point Elliot, 1855 |
| Nisqually | 5,000 acres | Executive Order, 1857 |
| Nooksack | 2,062acres | Federally recognized, 1973 |
| PortGambleKlallam | 1,301 acres | Federal land trust, 1935 |
| Puyallup | 18,061.5 acres | Treaty of Medicine Creek, 1855 |
| Quileute | one square mile | Executive Order, 1889 |
| Quinault | 196,645 acres | Executive Order, 1873, based on Quinault Treaty, 1855 |



| | | |
|---|---|---|
| Samish | 00 acres | Treaty of Point-No-Point, 1855 |
| Sauk Suiattle | 23 acres | Purchase, 1982 |
| Shoalwater Bay | one sq. mile + tidelands | Executive Order, 1886 |
| Skokomish | 4,987 acres | Treaty of Point-No-Point, 1855 |
| Spokane | 155,000 acres | Executive Order, 1881 |
| Squaxin Island | 2,175 acres | Treaty of Medicine Creek, 1854 |
| Stillaquamish | 60 acres | Actual acreage of "reserved" status is pending |
| Suquamish | 7,800 acres | Treaty of Point Elliott, 1855; enlarged by Executive Order, 1864 |
| Swinomish | 10 square miles | Treaty of Point Elliott, 1855 |
| Tulalip | 22,000 acres | Treaty of Point Elliott, 1855 |
| Upper Skagit | 130 acres | Executive Order, 1974 |
| Yakama | 1.4 million acres | Yakama Treaty, 1855 |

## Appendix II—Federally Recognized Tribes of Washington

Chehalis Confederated Tribes
Honorable David Youckton, Chr.
Chehalis Business Council
PO Box 536
Oakville, WA 98568
(360) 273-5911
FAX 273-5914

Colville Confederated Tribes
Honorable Joe Pakootas, Chair
Colville Business

Lummi Nation
Honorable Henry Cagey, Chair
Lummi Business Council
2616 Kwina Road
Bellingham, WA 98226-9298
(360) 384-1489
FAX 380-1850

Makah Tribe
Honorable Ben Johnson, Jr., Chair

Puyallup Tribe
Honorable Lawrence W. LaPointe, Chair
Puyallup Tribal Council
2002 East 28th Street
Tacoma, WA 98404
(253) 573-7800
FAX 573-7929

Quileute Tribe
Honorable Christian Penn, Jr., Acting Chair

Council
PO Box 150
Nespelem, WA 99155
(509) 634-4711
FAX 634-4116

* Hoh Tribe

Honorable Rick
Hor si, Chair
Hoh Tribal Business
Committee
2464 Lower Hoh Road
Forks, WA 98331
(360) 374-6582
FAX 374-6549

Jamestown S'Klallam
Tribe

Honorable W. Ron
Allen, Chair
Jamestown S'Klallam
Indian Tribe
1033 Old Blyn
Highway
Sequim, WA 98382
(360) 683-1109
FAX 681-4643

Kalispel Tribe

Honorable Glen
Nerlema, Chair
Kalispel Business
Committee
PO Box 39
Usk, WA 99180
(509) 445-1147
FAX 445-1705

Makah Tribal Council
PO Box 115
Neah Bay, WA 98357
(360) 645-2201
FAX 645-2788

Muckleshoot Tribe

Honorable John
Daniels, Jr.,
Chair
Muckleshoot Tribal
Council
39015 172nd Avenue
SE
Auburn, WA 98092
(253) 939-3311
FAX 939-5311

Nisqually Tribe

Honorable Stephanie
Scott, Chair
Nisqually Indian Tribe
4820 She-Nah-Num
Drive SE
Olympia, WA 98513
(360) 456-5221
FAX 407-0125

Nooksack Tribe

Honorable Art George,
Chair
Nooksack Indian Tribal
Council
PO Box 157
Deming, WA 98244
(360) 592-5176
FAX 592-5721

Quileute Tribal
Council
PO Box 279
La Push, WA 98350
(360) 374-6163
FAX 374-6311

Quinault Nation

Hon. Pearl
Capoeman-Baller,
Chair
Quinault Business
Committee
PO Box 189
Taholah, WA 98587
(360) 276-8211
FAX 276-4191

* Samish Nation

Honorable Kenneth
Hansen,
Chair
Samish Tribe of
Indians
PO Box 217
Anacortes, WA
98221
(360) 293-6404
FAX 299-0790

Sauk-Suiattle Tribe

Honorable Jason L.
Joseph,
Chair
Sauk-Suiattle Indian
Tribe
5318 Chief Brown
Lane
Darrington, WA
98241
(360) 436-0131
FAX 436-1511



Lower Elwha Klallam Tribe

Honorable Russ Hepfer, Chair
Elwha Klallam Business Council
2851 Lower Elwha Road
Port Angeles, WA 98363
(360) 452-8471 FAX 452-3428

Shoalwater Bay Tribal Council

Honorable Herb Whitish, Chair
PO Box 130
Tokeland, WA 98590
(360) 267-6766
FAX 267-6778

Skokomish Tribe

Honorable Gordon James, Chair
Skokomish Tribal Council
N. 80 Tribal Center Road
Shelton, WA 98584
(360) 426-4232 FAX 877-5943

* Spokane Tribe

Honorable Bruce Wynne, Chair
Spokane Tribal Business Council
PO Box 100
Wellpinit, WA 99040
(509) 258-4581 FAX 258-9243

Squaxin Island Tribe

Honorable David Whitener, Sr.,
Chair
Squaxin Island Tribal Council
SE 70 Squaxin Lane
Shelton, WA 98584
(360) 426-9781 FAX 426-6577

Stillaguamish Tribe

Honorable Priscilla Shipley, Chair
Stillaguamish Board of Directors

Port Gamble S'Klallam Tribe

Honorable Gerald Jones, Chair
Port Gamble Business Committee
31912 Little Boston Road NE
Kingston, WA 98346
(360) 297-2646 FAX 297-7097

Swinomish Tribe

Honorable Brian Cladoosby,
Chair
Swinomish Indian Senate
PO Box 817
LaConner, WA 98257
(360) 466-3163 FAX 466-5309

Tulalip Tribes

Honorable Stan Jones, Sr., Chair
Tulalip Board of Directors
6700 Totem Beach Road
Marysville, WA 98270-9694
(360) 651-4000 FAX 651-4032

* Upper Skagit Tribe

Honorable Floyd Williams, Chair
Upper Skagit Tribal Council
25944 Community Plaza
Sedro Woolley, WA 98284
(360) 856-5501 FAX 856-3175

Yakama Nation

Honorable William Yallup, Sr.,
Chair
Yakama Tribal Council
PO Box 151
Toppenish, WA 98948
(509) 865-5121 FAX 865-5528

Suquamish Tribe

Honorable Bennie J. Armstrong,
Chair

3439 Stoluckquamish Lane
Arlington, WA 98223
(360) 652-7362 FAX 435-7689

Suquamish Tribal Council
PO Box 498
Suquamish, WA 98392
(360) 598-3311 FAX 598-6295

Revised: 12/98 Governor's Office of
Indian Affairs PH: (360) 753-2411
FAX: (360) 586-3653

* Tribes not participating in this study



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## APPENDIX B

**New Mexico Indian Reservation Economic Study Group**

### Indian Reservations and the New Mexico Economy: Monograph 1:Reservation-Based Gaming Enterprises[1]

The New Mexico Indian Reservation Economic Study Group (the Study Group) is a consortium of business, academic, journalist, and public and private research organizations. Participants in the study, "Indian Reservations and the New Mexico Economy", include: the University of New Mexico, Institute for Public Policy; Stanford Research Institute International; National Economic Research Associates; The Center for Applied Research; Progress Publishing; Michael Hughes, Consultant on Indian Affairs; Daystar Associates; Wells Fargo Bank and Wells Fargo Foundation; Bank of America; and various scholars and analysts knowledgeable about public finance and federal Indian policy.

The purpose of this study is to analyze the economic and fiscal relationship that exists between Indian reservations in New Mexico and the State economy and revenue system. The research findings of the Study Group reveal a complex interplay between economic activity on Indian reservations and economic activity in the State as a whole, and they provide a factual basis from which State policy makers, tribal governments, and citizens of New Mexico can evaluate

[1] This document was created by combining two monographs summarizing the New Mexico Indian Reservation Economic Study Group's findings from Sandia Pueblo's website. The individual links are available at http://www.sandiapueblo.nsn.us/gaming/community_benefits.html.

existing laws and policy affecting tribal/State relations and evaluate new policies that may strengthen those relations.

The focus of this study is not on the American Indian population of New Mexico as an ethnic group, or only on what happens within reservation boundaries; the study adopts instead, an integrated view of Indian reservation-based economic activity, analyzing economic activity stimulated within reservation borders and also within the State economy surrounding reservations.

The Study Group's Approach:

The Study Group analyzed the Indian reservation-based economy in terms of five specific, measurable dimensions of economic activity, effectively covering the range of economic effects that characterize the interaction between New Mexico Indian reservations and the New Mexico economy as a whole. The five dimensions of reservation-based economic activity used to structure the research are:

- Indian reservation-based gaming enterprises
- Tourism in New Mexico attributable to Indian reservation
- The presence of the BIA and the IHS in New Mexico
- Indian tribal governments
- Indian reservation-based enterprises

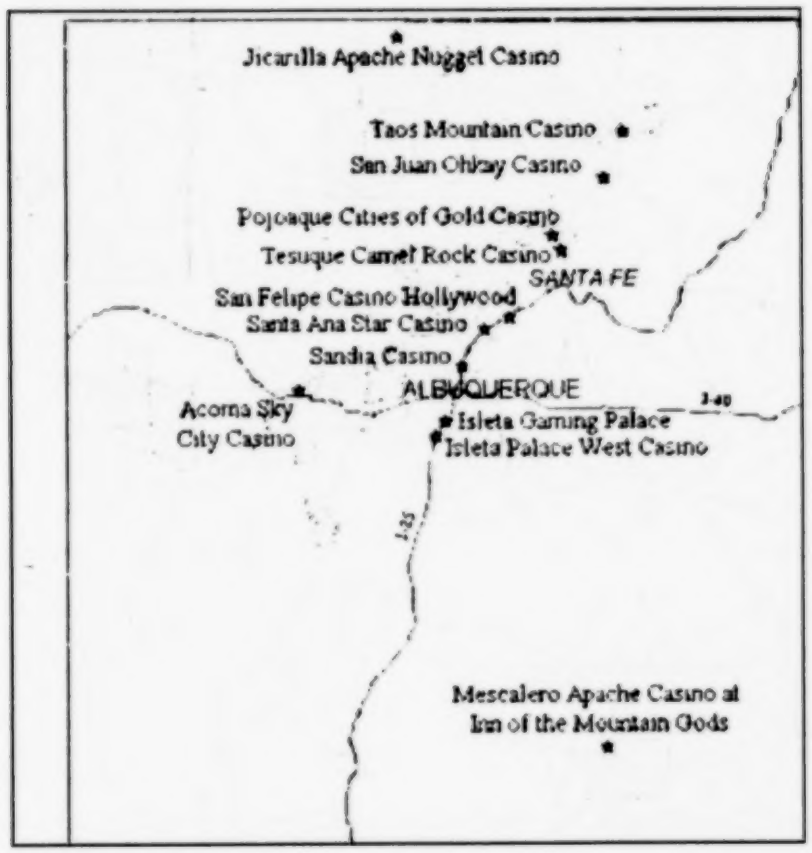
Reservation-Based Gaming Enterprises

This monograph, the first in a series of five, summarizes the Study Group's research findings regarding the influence of Indian reservation-based gaming enterprises in the New Mexico State economy. Eleven tribes in New Mexico operate casinos on their reservations. These tribes are:

- Pueblo of Isleta
- Pueblo of Sandia
- Pueblo of Acoma
- Pueblo of San Felipe



- Pueblo of Santa Ana
- Pueblo of Tesuque
- Pueblo of Taos
- Jicarilla Apache Tribe
- Pueblo of Pojoaque
- Pueblo of San Juan
- Mescalero Apache Tribe




The Study Group found that New Mexico's tribal gaming enterprises are employers of both Indians and non-Indians:

- 20% of all employees at New Mexico's tribal gaming enterprises are tribal members;
- The majority, 65%, are non-Indians;
- 22% of tribal gaming enterprise employees live on reservations where enterprises are located;
- The majority, 78%, live off the reservation in other New Mexico communities.

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The 11 tribal gaming enterprises mke [sic] substantial annual expenditures in the course of their business operations. Employee wages and salaries represent 51% of all New Mexico tribal gaming expenditures on an annual basis.

Expenditures for goods and services represent about 29% of total expenditures. Other significant expenditures are made for construction (about 6%) and debt service (about 8%). The reservations themselves capture little of the annual expenditures made by tribal gaming enterprises—about 6%. However, 69% of all tribal gaming enterprise expenditures made for goods, 54% of expenditures made for services, and 14% of expenditures made for construction occur within New Mexico.

The customer base of New Mexico's tribal gaming enterprises is varied. Overall, 10.3% of gross gaming revenues of tribal gaming enterprises are attributable to New Mexico residents. The remainder (89.7%) is attributable to out-of-state patrons of New Mexico's tribal gaming enterprises.

The Study Group's research findings show that Indian gaming has significant economic and fiscal effects in the New Mexico State economy; in 1998 Indian gaming was the source of 11,265 jobs and $226 million in wage and salary income. The spending for goods and services attributable to Indian reservation casinos in the State generated $64.7 million in State tax revenue in 1998. Table 1, Summary of the Economic and Revenue Effects of Reservation-Based Gaming Enterprises, summarizes the economic and revenue effects of Indian gaming in the State.



Table 1. Summary of the Economic and Revenue Effects of Reservation-Based GamingEnterprises (Source: The New Mexico Indian Reservation Economic Study Group, 1999; IMPLANPro Economic Model, 1999.)

| Economic Variables | Direct Impact | Secondary Impact | Total Impact |
|---|---|---|---|
| Employment | 4671 | 6594 | 11,265 |
| Wage/Salary Income ($ millions) | $84.2 | $142.1 | $226.3 |
| Total Personal Income ($ millions) | $91.2 | $244.3 | $335.5 |
| Fiscal Variables | Direct Impact | Secondary Impact | Total Impact |
| State General Fund Revenues ($ millions) | $30.3 | $34.4 | $64.7 |

Summary of The Economic and Revenue Effects of Indian Reservations in New Mexico

As noted above, Indian gaming is one of the five dimensions of reservation-based economic activity analyzed by the Study Group. The revenue impacts of Indian gaming enterprises (and the revenue impacts of the other four dimensions of reservation-based economic activity) have been compared to expenditures incurred by New Mexico State government due to the presence of Indian reservations in the State. The Indian reservation population uses State services, though in a far less intensive way, and so the State incurs costs on the population's behalf. The Study Group undertook an extensive analysis of fiscal year 1998 New Mexico State general fund spending to determine the share of general fund outlays that can be attributed to the Indian reservations in the State. The measure of New Mexico general fund outlays used for this analysis is the actual fiscal year 1998 general fund amount budgeted to each State agency, as reported in the Governor's budget (State of New Mexico Executive Budget, Gary E.

Johnson, Governor, Fiscal Year 2000). The overall finding is that State general fund expenditures attributable to the residents of Indian reservations in the State totaled $90.88 million in fiscal year 1998.

Table 2, Summary of the Economic and Revenue Effects of Indian Reservations in the New Mexico Economy, summarizes all of the impacts of Indian reservation-based economic activity on the New Mexico economy, including those associated with reservation-based enterprises, described above. Table 2 indicates that, in 1998, economic activity attributable to Indian reservations in New Mexico accounted for a total of 41,174 jobs State-wide and generated $898.8 million in wage and salary income and $1.5 billion in personal income. Perhaps most significantly, Indian reservation-based economic activity resulted in a total of $168.5 million in State general fund revenue.

Table 2. Summary of the Economic and Revenue Effects of Indian Reservations in the New Mexico Economy and Revenue System (Source: The New Mexico Indian Reservation Economic Study Group, 1999.)

| Economic Variables | Direct Impact | Secondary Impact | Total Impact |
|---|---|---|---|
| Employment | 22,592 | 18,582 | 41,174 |
| Wage/Salary Income ($ millions) | $510.9 | $387.9 | $898.8 |
| Total Personal Income ($ millions) | $789.1 | $686.3 | $1,475.4 |
| State General Fund Revenues ($ millions) | $77.9 | $90.6 | $168.5 |



As can be seen in Table 3, Net Fiscal Effects, the total 1998 State general fund tax revenue attributable to Indian reservations in New Mexico, ($168.5 million), compares to $90.88 million in 1998 State general fund spending for public services utilized by reservation-based Indian and non-Indian residents.

Table 3. Net Fiscal Effects (Source: The New Mexico Indian Reservation Economic Study Group, 1999.)

| Fiscal Impacts | |
|---|---|
| Total New Mexico General Fund Expenditures Attributable to Indian Reservation Population ($ millions) | $90.88 |
| Total New Mexico General Fund Tax Revenues Attributable to Indian Reservation-Based Economic Activity ($ millions) | $168.5 |
| Net Fiscal Effect ($ millions): | $77.6 |

**Indian Reservations and the New Mexico Economy: Monograph 2: Tourism**

Tourism Attributable to Indian Reservations

This monograph summarizes the Study Group's research findings regarding tourism associated with the presence of Indian reservations in New Mexico. Tourism is not a single industry, but rather a collection of trade and service sectors that are typically and logically grouped together for analytical purposes. Lodging, eating and drinking establishments, certain recreational services, transportation, and various retail trade sectors comprise the "tourism" industry in New Mexico.

The importance of Indian culture to the overall tourism industry in New Mexico (and the importance of reservations in sustaining Indian culture) is evident from the omnipresence of American Indian themes which find expression in virtually every aspect of the State's tourism "portfolio": recreation sites, fine arts, food, museums, intellectual history, historical monuments, fashions, literature, as well as the unique beauty and allure of a preserved land base (i.e., the Pueblos and reservations). The Study Group formulated a model of attribution and then identified and assembled relevant data that resulted in a specific estimate that is credible as a measure of this relationship and its effects.

**A Model for Indian-Motivated Tourism Spending:** The concept of Indian-motivated tourism spending may be expressed as, *"Spending attributable to New Mexico visitors attracted to the state by Indian culture, the attributes of which are embodied in and emanate from the Indian reservations of New Mexico."*



In the field of economics, this approach to quantifying consumer demand using information about different consumer choices is called "revealed preference theory". Revealed preference theory seems to best describe the total drawing power of Indian culture and the Indian Reservation presence in New Mexico because it captures both off-reservation and on-reservation spending by Indian-motivated visitors.

The model that quantifies the concept of Indian-motivated tourism spending defines Indian tourism spending in New Mexico as the product of two factors:

1. Total Visitor Spending: $2.14 billion;
2. Percent of Spending Attributable to Visitors Motivated by "Indian Culture": 13.4%

Multiplying the total spending estimate of approximately $2.14 billion by 13.4%–the relative importance of Indian culture and visitor motivation revealed in the study–yields $286.2 million, the total spending attributable to Indian motivated visitors.

The level of Indian-motivated visitor spending demonstrated by these estimates is evidence of an important linkage between the Indian reservations of New Mexico and the vitality of tourism in the State. The allure of Indian culture attracts New Mexico tourists and generates significant visitor spending, establishing Indian Reservations as substantial contributors of economic and fiscal benefits to the State.

The Study Group's research findings show that Indian reservation-attributable tourism is a source of significant positive economic and fiscal effects in the New Mexico State economy; in 1998 Indian reservation related tourism was the source of 10,539 jobs and $149 million in wage and salary income. The spending for goods and services associated with tourism attributable to Indian reservations resulted in $33.8

million in State tax revenue in 1998. Table 1, Summary of the Economic and Revenue Effects of Tourism Attributable to Indian Reservations, summarizes the economic and revenue effects of tourism related to Indian culture in the State.

Table 1. Summary of the Economic and Revenue Effects of Tourism Attributable to Indian Reservations (Source: The New Mexico Indian Reservation Economic Study Group, 1999; IMPLANPro Economic Model, 1999.)

| Economic Variables | Direct Impact | Secondary Impact | Total Impact |
|---|---|---|---|
| Employment | 7,620 | 2,919 | 10,539 |
| Wage/Salary Income ($ millions) | $92.4 | $56.6 | $149.0 |
| Total Personal Income ($ millions) | $137.9 | $104.7 | $242.6 |
| Fiscal Variables | Direct Impact | Secondary Impact | Total Impact |
| State General Fund Revenues ($ millions) | $20.8 | $13.0 | $33.8 |

Summary of The Economic and Revenue Effects of Indian Reservations in New Mexico

As noted above, tourism attributable to Indian reservations is one of the five dimensions of reservation-based economic activity analyzed by the Study Group. The revenue impacts of tourism attributable to Indian reservations (and the revenue impacts of the other four dimensions of reservation-based economic activity) have been compared to expenditures incurred by New Mexico State government due to the presence of Indian reservations in the State. The Indian reservation population uses State services, though in a far less intensive way, and so the State incurs costs on the population's behalf. The Study Group undertook an extensive analysis of fiscal year 1998 New Mexico State general fund spending to determine the share of general fund outlays that



can be attributed to the Indian reservations in the State. The measure of New Mexico general fund outlays used for this analysis is the actual fiscal year 1998 general fund amount budgeted to each State agency, as reported in the Governor's budget (State of New Mexico Executive Budget, Gary E. Johnson, Governor, Fiscal Year 2000). The overall finding is that State general fund expenditures attributable to residents of Indian reservations in the State totaled $90.88 million in fiscal year 1998.

Table 2, Summary of the Economic and Revenue Effects of Indian Reservations in the New Mexico Economy, summarizes all of the impacts of Indian reservation-based economic activity on the New Mexico economy, including those associated with tourism, described above. Table 2 indicates that, in 1998, economic activity attributable to Indian reservations in New Mexico accounted for a total of 41,174 jobs State-wide and generated $898.8 million in wage and salary income and $1.5 billion in personal income. Perhaps most significantly, Indian reservation-based economic activity resulted in a total of $168.5 million in State general fund revenue.

Table 2. Summary of the Economic and Revenue Effects of Indian Reservations in the New Mexico Economy and Revenue System (Source: The New Mexico Indian Reservation Economic Study Group, 1999.)

| Economic Variables | Direct Impact | Secondary Impact | Total Impact |
|---|---|---|---|
| Employment | 22,592 | 18,582 | 41,174 |
| Wage/Salary Income ($ millions) | $510.9 | $387.9 | $898.8 |
| Total Personal Income ($ millions) | $789.1 | $686.3 | $1,475.4 |
| State General Fund Revenues ($ millions) | $77.9 | $90.6 | $168.5 |

As can be seen in Table 3. Net Fiscal Effects, the total 1998 State general fund tax revenue attributable to Indian reservations in New Mexico, ($168.5 million), compares to $90.88 million in 1998 State general fund spending for public services utilized by reservation-based Indian and non-Indian residents.

Table 3. Net Fiscal Effects (Source: The New Mexico Indian Reservation Economic Study Group, 1999.)

| Fiscal Impacts | |
|---|---|
| Total New Mexico General Fund Expenditures Attributable to Indian Reservation Population ($ millions) | $90.88 |
| Total New Mexico General Fund Tax Revenues Attributable to Indian Reservation-Based Economic Activity ($ millions) | $168.5 |
| Net Fiscal Effect ($ millions): | $77.6 |

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IN THE

# Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,
*Petitioner,*

v.

ONEIDA INDIAN NATION OF NEW YORK,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR THE UNITED SOUTH AND EASTERN TRIBES, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE*[1]

The United South and Eastern Tribes, Inc. ("USET") is a non-profit, inter-tribal organization founded in 1968, comprising twenty-four federally-recognized tribal governments from an area stretching from Maine to Texas.[2] USET is dedicated to promoting Indian leadership, improving the quality of life for American Indians, and protecting Indian rights and natural resources on tribal lands.

Petitioner's contention that the federal courts can and must second-guess the determinations of the political branches as to the core fact of tribal recognition and must independently assess a Tribe's "continuous tribal existence" strikes deep at the concerns of USET's members. For the

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] The twenty-four member Tribes of USET are the Alabama-Coushatta Tribe of Texas; the Aroostook Band of Micmac Indians; the Catawba Indian Nation; the Cayuga Nation; the Chitimacha Tribe of Louisiana; the Coushatta Tribe of Louisiana; the Eastern Band of Cherokee Indians; the Houlton Band of Maliseet Indians; the Jena Band of Choctaw Indians; the Mashantucket Pequot Tribal Nation; the Miccosukee Tribe of Florida; the Mississippi Band of Choctaw Indians; the Mohegan Tribe of Connecticut; the Narragansett Indian Tribe; the Oneida Indian Nation of New York; the Passamaquoddy Tribe-Indian Township; the Passamaquoddy Tribe-Pleasant Point; the Penobscot Indian Nation; the Poarch Band of Creek Indians; the Seminole Tribe of Florida; the Seneca Nation of Indians; the St. Regis Band of Mohawk Indians; the Tunica-Biloxi Indians of Louisiana; the Wampanoag Tribe of Gay Head (Aquinnah).

better part of 150 years, this Court has expressly held that the decision of the federal political branches to recognize a Tribe is a political question that the federal courts may not review. Requiring Tribes to defend and reestablish their tribal status in court after having received federal recognition by the political branches represents an affront to Tribes, which have relied on the political branches' representations and determinations regarding their tribal status. Moreover, litigation concerning alleged tribal "discontinuity," particularly where, as in the instant case, a Tribe has been recognized by the federal government for centuries, threatens to turn all disputes involving the sovereignty of USET members into lengthy, expensive, and disruptive fact-specific inquiries into tribal history. Such inquiries place a tremendous strain on limited tribal resources. USET thus has a substantial interest in opposing petitioner's novel "continuity" attack and in ensuring that this Court affirms its longstanding precedent that the federal political branches' recognition of a Tribe is binding on the courts and all parties in all but the most unusual circumstances.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In an unbroken line of precedent spanning nearly a century-and-a-half, this Court has held that, once the political branches have recognized a Tribe, it is not the province of the judiciary to second-guess that determination and separately inquire into tribal existence. To the contrary, if the "political departments" have recognized a Tribe – as they have for centuries, in the case of the Oneidas – then "this court must do the same," *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866), for "it rests with Congress to determine when the relationship [between the Tribe and the United States] shall cease." *Winton v. Amos*, 255 U.S. 373, 392 (1921); *see also* Pet. App. 44a (same).



Entirely ignoring this line of cases, petitioner and its *amici* advance the novel argument that the federal courts hearing a claim under the Nonintercourse Act must conduct a searching inquiry to determine whether, for some ill-defined period over the course of a Tribe's history, there has been a temporary "lapse" in "tribal status." Petr. Br. 40-41, Br. for Cayuga County *et al.* at 4. According to petitioner, a Tribe has "no rights" under the Act unless the Tribe "has been in continuous tribal existence" from the time of the alleged violation. Petr. Br. at 40. *Any* lapse in tribal "continuity" – a vague concept that petitioner never defines – terminates a Tribe's rights. This is so regardless of whether the Tribe has been (as here) explicitly recognized by the political branches of the United States as the successor in interest to the Tribe that suffered the Nonintercourse Act violation. Indeed, in petitioner's view, even where (as here) a Tribe has been formally recognized by the United States for centuries, "continuity" remains at issue, and a court must independently evaluate the bedrock fact of tribal recognition at each moment in the Tribe's history.

Petitioner's view is not, and should not be, the law. No judicial inquiry into tribal status is necessary or appropriate in this case because respondent (1) has been deemed by the political branches to be the successor-in-interest entitled to assert the instant claim, and (2) has been recognized by the political branches as a Tribe and has never had such recognition withdrawn. In arguing otherwise, petitioner ignores entirely this Court's longstanding precedent establishing that matters of tribal recognition and tribal status are quintessential "political questions" into which courts should not intervene, except in the most extraordinary of circumstances. That precedent is well-grounded. The Constitution expressly vests broad power to recognize Tribes

in the political branches, through the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Executive's treaty-making and war powers, *id.* art. II, § 2, cls. 1-2, as well as the Executive's power to recognize foreign governments. Moreover, establishing a Tribe's status over the course of centuries is a massive undertaking, involving voluminous fact-gathering, informed by anthropological and historical expertise, to make what is, ultimately, a political judgment. Such an inquiry is ill-suited to judicial determination.

Rather than confront this case law, petitioner cites only a handful of lower court decisions in which courts found it necessary to make tribal status determinations to adjudicate Nonintercourse Act claims. But those cases involved Tribes that – unlike the Oneidas – were not federally recognized, and that had not maintained a long, documented history of formal treaty and trust relations with the United States. Because those Tribes lacked federal recognition, courts were required to assess the Tribes' status, including (*inter alia*) continuity of tribal leadership, to determine whether the Tribes were entitled to mount Nonintercourse Act claims. Those cases – which *expanded* the protection of the Nonintercourse Act beyond federally recognized Tribes – provide no support for a free-floating "continuity" inquiry for federally recognized Tribes.

Not only would requiring a full-blown inquiry into tribal continuity in every Nonintercourse Act case run counter to this Court's precedent, but it would impose a senseless burden on both Tribes and courts. A costly, resource-intensive analysis of the Oneidas' historical pedigree is pointless. The political branches have formally recognized the Oneidas, fulfilled their treaty obligations to the Oneidas for over two centuries, and, indeed, determined that the



Oneidas *are* the Tribe whose Nonintercourse Act rights were violated. In the face of such determinations, a judicial inquiry into tribal continuity erects a needless obstacle to a Tribe's assertion of its congressionally created rights.

Moreover, requiring federally recognized Tribes to reestablish their continuous existence whenever an opposing party raises the issue (or points to one or two questionable shards of evidence on the topic, which is all that petitioner has done here) would be an affront to Tribes, such as the Oneidas, that have relied upon their longstanding relationship with the United States government. Where the political branches have continuously recognized a Tribe throughout this Nation's history, and where the Tribe has managed, despite great adversity and patently illegal actions by the State, to remain intact as a Tribe, requiring the Tribe to undergo a searching tribal "continuity" each time it seeks to vindicate its rights would be as unjust as it is unprecedented.

## ARGUMENT

### I. TRIBAL "CONTINUITY" IS IRRELEVANT WHERE THE TRIBE AT ISSUE IS THE FEDERALLY RECOGNIZED SUCCESSOR IN INTEREST TO THE TRIBE WHOSE LAND WAS SOLD IN VIOLATION OF THE NONINTERCOURSE ACT.

Petitioner has made the unprecedented claim that the land at issue may not be deemed Indian country and that the Oneidas have *no* rights under the Indian Trade and Intercourse Act, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177) ("Nonintercourse Act"), unless the federal courts conclude that "the Oneida Indian Nation has been in continuous tribal existence since the Properties became

subject to the Act." Petr. Br. at 40. The Oneidas' alleged "discontinuity" – a term petitioner never defines – is a red herring. When the political branches have determined that the Tribe raising a Nonintercourse Act claim is the successor in interest to the Tribe whose land was illegally sold, it is irrelevant whether the Tribe's existence was continuous. That is what the Second Circuit held, *see* Pet. App. 42a (holding that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land"), and that holding is correct.

Petitioner's contrary argument has no basis in law or logic. According to petitioner, "If there was a lapse in the Oneida Indian Nation's tribal status, [Nonintercourse Act] coverage and Indian country status both terminate at the moment in time when that lapse begins." Petr. Br. at 41. That argument – that any lapse terminates tribal status – is sufficiently extreme that even petitioner's *amici* reject it, acknowledging that "a one-year lapse in tribal identity, or even a five- or ten-year lapse, might not break the connection between the historic tribe's treaty rights and the modern group claiming those rights." Br. for Cayuga County *et al.*, at 8-9. In any event, the core claim of petitioner and its *amici* that there must be a judicial inquiry into continuity for *every* claim under the Nonintercourse Act is without foundation.

The Nonintercourse Act imposes no such requirement. Rather, the statutory text makes clear that a violation of the Act is complete at the moment that a conveyance of land takes place, without the consent of the United States, "from any Indian nation or tribe of Indians." 25 U.S.C. § 177. From that moment forward, the land transfer shall be of no "validity in law or equity." *Id.* It is undisputed that the



Oneidas were an "Indian nation or tribe of Indians" at the time of the sale of lands at issue here. Accordingly, the Oneidas have demonstrated the tribal status to needed to establish a Nonintercourse Act violation.

The only other issue relevant to tribal status is whether the plaintiff Tribe may seek to remedy the Nonintercourse Act violation. But that inquiry reflects only the standard requirement that plaintiff allege sufficient "injury in fact" – *i.e.*, that plaintiff "personally has suffered some actual or threatened injury" as a result of the defendant's allegedly illegal conduct – to have standing to bring the claim. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Franchise Tax Board of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 335 (1990). Where, as here, the plaintiff Tribe is indisputably the successor in interest of the Tribe that has suffered the Nonintercourse Act violation, then the plaintiff has alleged the "personal" connection to the alleged violation necessary to show "injury in fact," and the suit should be allowed to proceed. *Cf. South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 500 n.2 (1986) (adjudicating a Tribe's claims on the assumption that "respondent is the successor in interest of the Catawba Indian Tribe of South Carolina").

Petitioner, however, would require a plaintiff show continuous tribal existence. But petitioner offers no justification for imposing such a requirement, other than the conclusory assertion that *not* requiring continuity would be "illogical, circular and incorrect." Petr. Br. at 40. Moreover, petitioner's claimed requirement is inconsistent with general legal principles, under which plaintiffs routinely bring suit even though they may have lacked standing had they sued earlier. Indeed, the rule that petitioner suggests is in direct

conflict with the principle articulated by the Court that if a plaintiff has standing at the time of suit, no inquiry into past standing is necessary or appropriate. *See, e.g. Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1924 (2004) ("It has long been the case that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'") (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)).

Nor does petitioner's novel continuity test find any support as a matter of Indian law. Indeed, in *United States v. John*, 437 U.S. 653 (1978), this Court flatly rejected an analogous effort to invest tribal continuity with talismanic significance, holding that "[n]either the fact that the [Tribe is] merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." 437 U.S. at 653.[3]

Lacking any support from this Court's Indian law precedent or general legal principles, petitioner suggests nonetheless that the lower courts have imposed a tribal continuity requirement. *See* Petr. Br. at 40-41. But as the Second Circuit correctly concluded, *see* Pet. App. 42a & n.23, *none* of the cases cited by petitioner involved – as the instant case does – a determination by the political branches that the plaintiff Tribe was a successor in interest to the Tribe whose rights were violated. Rather, in each of those cases,

[3] Indeed, the discontinuity allegations in *John* were strikingly similar to those raised by petitioner. It was alleged that "since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians." 437 U.S. at 652.



the court was faced with adjudicating a Nonintercourse Act claim in the absence of a federal determination that the Tribe was the proper party to bring the claim. Lacking relevant federal guidance, the courts looked to tribal continuity – among other factors – to determine whether the parties bringing suits were proper plaintiffs. Regardless whether a continuity analysis is appropriate in the *absence* of a determination by the political branches, there is no basis (and petitioner has pointed to no authority) for importing such a requirement when the political branches have determined that a Tribe is indeed a successor in interest.

Here, the political branches have spoken, declaring unambiguously that respondent is the successor in interest to the Oneida Tribe that signed the 1794 Treaty and whose land was subsequently sold in violation of the Nonintercourse Act. Demonstrating this most clearly, the United States pays annuities owed from the 1794 Treaty to respondent, as it has done for centuries. *Oneida Indian Nation v. Oneida County*, 434 F. Supp. 527, 538 (N.D.N.Y. 1977) ("The New York Oneidas still receive annuities under the 1794 Treaty with the Six Nations."). If respondent were not the political successor to the original Oneida Tribe – and if the political branches of the United States Government did not recognize respondent as such – then there would be no basis for such payments.

Moreover, the Executive Branch has submitted a sworn statement in the Oneidas' land claims litigation declaring that respondent is not only the successor in interest to the Tribe that signed the 1794 Treaty, but that the Tribes are actually one and the same. *See* JA 207 ("The Oneida Indian Nation of New York is one of the Indian tribes which entered into and signed the . . . Treaty with the Six Nations, dated November 11, 1794, 7 Stat. 43.").

These determinations are dispositive. As this Court has recognized, the federal government's determination that a particular sovereign government is a successor in interest to a prior sovereign presents a political question that the federal courts may not review. *See, e.g.*, *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) (holding that Treaty obligation with the Kingdom of Prussia made prior to formation of the German Empire remained in force because "the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not to interfere with the conclusions of the political department in that regard"); *Clark v. Allen*, 331 U.S. 503, 514 (1947) (rejecting suggestion that treaty with Germany had necessarily terminated after World War II when Germany "had ceased to exist" and holding that "the question whether a state is in a position to perform its treaty obligations is essentially a political question"); *Luther v. Borden*, 48 U.S. (7 How.) 1, 12 (1849) (refusing, on political question grounds, to determine which of two competing state governments was legitimate).

Given these well-settled principles, it is unsurprising that every court to have considered the question has permitted respondent to enforce the rights belonging to the Oneidas who signed the 1794 Treaty of Canandaigua. *See, e.g.*, *Oneida Indian Nation v. United States*, 26 Ind. Cl. Comm. 138, 149 (1971), *aff'd*, 201 Ct. Cl. 546 (1973); *Oneida Indian Nation*, 434 F. Supp. at 532-33, 538, 540; *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 527-28, 539 (2d Cir. 1983); *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 118-19 (N.D.N.Y. 2002).

Those decisions are consistent with this Court's conclusion that the Oneidas are "direct descendents of members of the Oneida Indian Nation." *Oneida County v.*



*Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (*Oneida II*); *see also id.* at 256 (Stevens, J., dissenting) (describing respondent Oneidas as "successors in interest" to the 1794 Tribe). Indeed, had the Court believed that respondent was not the successor in interest to the original Oneida Tribe, it could not have affirmed the decision in *Oneida II* because the Tribe would have lacked standing to bring its claim.

In short, respondent is the successor in interest to the Oneidas that were party to the 1794 Treaty of Canandaigua. Petitioner has pointed to *no* legal authority for an independent "continuity" requirement, particularly where, as here, the political branches have conclusively identified respondent as entitled to assert the Nonintercourse Act rights at issue. Accordingly, any alleged discontinuity in the Oneidas' existence provides no basis for reversing the Second Circuit's decision.[4]

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[4] Similarly meritless is petitioner's suggestion that, pursuant to *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), any tribal discontinuity requires a tribe to seek formal restoration of the land to trust status for the land to be exempt from taxation. *See* Petr. Br. at 41. Just as petitioner's Nonintercourse Act cases are inapposite, so is *Cass County*, because in *Cass County* – unlike here – Congress had expressed a "clear intent" to remove federal protection and "subject the land to taxation by making it alienable." 524 U.S. at 114. In contrast, here, far from withdrawing federal recognition, Congress has continually reaffirmed the Oneidas' status as a recognized Tribe.

## II. BECAUSE THE POLITICAL BRANCHES HAVE NOT TERMINATED THE ONEIDAS' TRIBAL STATUS – AND INDEED HAVE CONTINUOUSLY TREATED THE ONEIDAS AS A TRIBE SINCE AT LEAST 1794 – ANY CONTINUITY REQUIREMENT HAS BEEN SATISFIED.

Even assuming that tribal continuity is relevant to the Oneidas' Nonintercourse Act claims, any continuity requirement is satisfied here. The political branches formally recognized the Oneidas as a Tribe in the 1794 Treaty of Canandaigua (if not earlier). Since that time, the federal government has continued to recognize the Oneida Tribe in numerous ways, including continuously satisfying the federal government's obligations under the 1794 Treaty.

Petitioner nevertheless argues that the Oneidas allegedly ceased to exist as a Tribe "in the late nineteenth and early twentieth centuries." Petr. Br. at 16. But that contention – meritless in any event, *see infra* pp. 25-29 – is misplaced. As nearly 150 years of case law from this Court make clear, tribal recognition is a quintessential political question, and it is for the political branches – not the courts – to determine when a federally recognized tribe ceases to exist. Indeed, this Court has never undertaken an independent "continuity" inquiry where federal government recognition is present.[5]

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[5] In *United States v. Joseph*, 94 U.S. 614 (1876), the Court determined that a federally recognized Tribe – the Pueblos – were not protected under the Nonintercourse Act. "Continuity" had nothing to do with the Court's decision, however, which was based on a inquiry into the Tribe's "degree of civilization." 94 U.S. at 617. Moreover, the *Joseph* inquiry was subsequently disavowed by this Court. *See, e.g., United States v. Sandoval*, 231 U.S. 28, 48-49 (1913) (declining to follow *Joseph* and agreeing



Petitioner's contention that the federal courts should, in all Nonintercourse Act cases, independently consider whether a federally recognized Tribe ceased to exist at some point in its history goes to the heart of the concerns that animate the political question doctrine. It would embroil the courts in difficult factual and historical disputes that the courts are ill-equipped to manage and that litigation is poorly designed to resolve. Moreover, such an inquiry poses an array of questions that defy judicially manageable standards and that require political rather than legal judgments: What does "continuity" mean and how is it measured? How long a "discontinuity" is required to terminate tribal existence? What sources are authoritative to determine these matters?

Thus, in trying to prove that the Oneidas were sufficiently "discontinuous" that they ceased to exist, petitioner misunderstands the relevant continuity inquiry. The question is not whether (as an ill-defined "factual" matter) the Tribe ceased to exist, but whether the political branches have formally terminated tribal existence. Here, where the federal government has never formally terminated the Tribe and, to the contrary, has continuously recognized the Tribe for more than 200 years, any continuity requirement is unequivocally met.

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"with the long-continued action of the legislative and executive departments" recognizing the Pueblos as a Tribe); *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926) (disavowing *Joseph* and determining that the Pueblos were indeed a Tribe covered by the Nonintercourse Act); *United States v. Chavez*, 290 U.S. 357, 363 (1933) (noting that in *Sandoval*, the Court had "disapproved and declined to follow the decision" in *Joseph*). Notably, petitioner's *amici* cite *Joseph* in support of their challenge to the Oneidas' tribal status, without noting this Court's subsequent repudiation of that case. *See* Br. for Cayuga County *et al.*, at 21.

**A. Once The United States Has Recognized A Tribe, It Is For The Political Branches – And Not The Courts – To Determine If And When The Tribe Ceases To Exist.**

1. Recognition of Tribes and the termination of tribal existence are matters committed to the political branches. For nearly 150 years, this Court has consistently held that tribal recognition is a "political question," which shall not be disturbed by the courts. *See Baker v. Carr*, 369 U.S. 186, 215 (1962) (describing the Court's "deference to the political departments in determining whether Indians are recognized as a tribe," because this inquiry has "familiar attributes of political questions"); *Miami Nation of Indians of Indiana, Inc. v. United States Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (Posner, J.) (noting that tribal recognition "lies at the heart of the doctrine of 'political questions.'").[6]

In *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866), for example, this Court refused to disturb an Interior Department recognition of the Michigan Chippewa Indians, despite arguments that certain treaty language could be read to have effected the dissolution of that Tribe:

[6] *Baker v. Carr* described the determination of tribal status as a paradigm example of a non-reviewable political question that directly implicates the separation of powers rationales for the political question doctrine: "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable and manageable standards for resolving it," "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.



> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

70 U.S. at 419. Similarly, in *In re Kansas Indians*, 72 U.S. (5 Wall. ) 737, 757 (1867), the Court rejected attempts by the State of Kansas to tax certain Indian Tribes, where those Tribes were recognized by the Interior Department: "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." 72 U.S. at 757.[7]

Deference to the political branches is particularly warranted concerning the issues of termination or cessation

[7] Leading treatises and scholars recognize that the courts may not disturb a tribal recognition determination by the political branches. *See, e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* 3 (1982 ed.) ("When Congress or the Executive has found that a tribe exists, courts will not normally disturb such a determination."); 13A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3534.2 (2d ed. 1984) ("As to 'distinctly Indian communities,' it is accepted that Congress, not the courts, is to determine the extent to which 'they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States.'"); Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 64 (1979-80) ("[T]he courts will neither review the tribal status of a federally-recognized tribe nor disturb the prior recognition of a tribe by the federal government.").

of tribal status. Once a group of Indians is recognized as a Tribe, "[w]hen they shall be let out of that state is for the United States to determine without interference by the courts or by any state." *United States v. Rickert*, 188 U.S. 432, 443 (1903); *see, e.g.*, *Winton*, 255 U.S. at 392 (explaining that, with respect to tribal recognition, "it rests with Congress to determine when the relationship shall cease"); *United States v. Waller*, 243 U.S. 452, 459 (1917) (describing as "well-settled" the principle that the power to end tribal recognition "rests with Congress"); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 316 (1911) (explaining "that it rests with Congress to determine when its guardianship [over particular Indians] shall cease"); *Chippewa Indians v. United States*, 307 U.S. 1, 4 (1939) (rejecting arguments made that the Chippewa tribe had dissolved, where Congress recognized the tribe and "did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians"); *see also United States v. John*, 437 U.S. at 650; *accord* Pet. App. 44a ("Once a tribe has been recognized, the removal of that recognition . . . is a question for other branches of government.").[8]

This long line of precedent is not surprising. The Constitution vests Congress and the Executive Branch, and not the Judicial Branch, with the power to recognize Tribes. Most prominently, the "Indian Commerce Clause" of the Constitution explicitly grants Congress power "[t]o regulate

[8] Congress has made explicit its own view that the courts have no role in tribal termination decisions. The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, contains an express finding that by Congress that it alone has the power to terminate a recognized tribe. *Id.* § 103(4) ("The Congress finds that . . . a tribe which has been recognized [by Congress, by the federal acknowledgement process, or by the courts] may not be terminated except by an Act of Congress.").



Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, and has been recognized as the basic source of Congress's "plenary power" with respect to Indians. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). Moreover, the Executive Branch has such powers in its own right, through Article II's treaty-making and war powers, *see* U.S. Const. art. II, § 2, cls. 1-2; *Morton*, 417 U.S. at 552 (recognizing this source of power), and the authority to recognize foreign governments, *see, e.g.*, *United States v. Lara*, 124 S. Ct. 1628, 1644 (2004) (Thomas, J., concurring) (citing *United States v. Pink*, 315 U.S. 203, 228-30 (1942)).[9]

Tribal recognition is "[a] formal political act" that "permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,'" and "institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status." H.R. Rep. No. 103-781, at 2-3 (1994) (footnote omitted). Thus, the acknowledgement of sovereign status is quintessentially a

[9] In other contexts, the precise boundaries between the power of the Executive Branch and that of Congress remain subject to debate. *See, e.g.*, *Lara*, 124 S. Ct. at 1642-43 (Thomas, J., concurring). That debate is largely academic here, however, because Congress has delegated power over tribal management and regulation to the Executive Branch, *see* 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457, giving that Branch unquestioned authority to recognize Indian tribes. *See Miami Nation*, 255 F.3d at 345 (Posner, J.). Regardless how power is allocated as between the political branches, the critical point here is that the recognition power unquestionably belongs to the political branches, rather than the judiciary.

political judgment, one in which the courts' competence is at its nadir. *See, e.g.*, *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.").

Petitioner's suggestion that the Oneidas must satisfy the definitional test for a "Tribe" set forth in *United States v. Candelaria*, 271 U.S. 432, 442 (1926), and *Montoya v. United States*, 180 U.S. 261, 266 (1901), is thus misguided. Petr. Br. at 40-43. In *every single case* cited by petitioner for its claim that the judiciary must inquire into tribal status, the federal government had *not* recognized the Tribe at issue and had *not* made any determination as to tribal continuity. *See* Pet. Br. at 40-41 (citing *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987) (*Mashpee II*); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 & n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979) (*Mashpee I*)). In the absence of formal recognition by the political branches, courts have, with understandable reluctance, applied the *Candelaria* analysis.[10] Those cases do not implicate the political question doctrine, however, because the political branches have not acted.

Indeed, Petitioner turns this line of cases on its head. *See* Petr. Br. 41. Those cases – all of which concerned Tribes

[10] The Nonintercourse Act applies to "any . . . tribe of Indians," 25 U.S.C. § 177, not just federally recognized tribes. *See, e.g.*, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 & n.8 (1st Cir. 1975); *Mashpee I*, 592 F.2d at 581.



that had not yet received federal recognition – merely hold that federal *non-recognition* does not foreclose a Nonintercourse Act claim. *See, e.g.*, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975) (finding "nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized," and that "an inclusive reading [is] consonant with the policy and the purpose of the Act").

It is thus irrelevant that, in conducting the tribal inquiry where federal recognition is absent, courts have examined whether the Tribe has existed on a substantially continuous basis since the time of the alleged violation of the Nonintercourse Act. *See, e.g.*, *Mashpee I*, 592 F.2d at 581, 585 (assessing "continuity of leadership" and other factors to determine the Mashpees' standing and right to recovery under the Act, where "[t]he federal government has never officially recognized the Mashpees as a tribe or actively supported or watched over them"). Simply because courts may evaluate tribal continuity, among other factors, in determining whether a non-federally recognized Tribe may mount a Nonintercourse Act claim, it does not follow that courts must, in all cases, make an independent determination that a Tribe "has been in continuous tribal existence since the Properties became subject to the Act." Petr. Br. at 40. No court has used that analysis to independently assess tribal status and ultimately deny such status to a federally recognized Tribe. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37, 64-65 (1992) (summarizing cases). The case law

cited by petitioner thus has no application to a federally recognized Tribe such as the Oneidas.[11]

Not only is it well-supported in precedent, but the principle that the courts should not second-guess the determinations of the political branches by applying *Candelaria* or otherwise inquiring independently into continuous tribal existence is a sound one. Absent federal recognition, disputes about tribal existence are frequently difficult, historical, fact-intensive, and policy-laden – precisely the sort of disputes that courts are ill-suited to

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[11] Nor can this line of cases be read to establish that a Tribe may voluntarily abandon its protected status for purposes of the Nonintercourse Act. *Cf.* Petr. Br. 42. To the extent these cases suggest such a principle, however, they do not concern the situation of Tribes that continue to be federally recognized. Indeed, "[a]s an operative judicial principle, voluntary abandonment of tribal status presumably must be limited to non-recognized tribes. Insofar as other branches of the federal government continue to recognize the tribal status of a group of Indians, judicial, and more importantly jury, review of that question would appear precluded by the political question doctrine." Clinton & Hotopp, *supra*, at 67; *see also Rickert*, 188 U.S. at 443 (ending tribal status "is for the United States to determine without interference by the courts or by any state."). *Cf. Terlinden*, 184 U.S. at 287 ("Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States.'") (internal quotation and citation omitted); *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913) (holding that a treaty treated by the United States as binding was binding, despite the efforts of treaty-partner to exempt itself from that treaty); Cohen, *supra*, at 18 ("any continuing organization, however informal, would deny the abandonment of tribal existence").



resolve. *See, e.g. Golden Hill*, 39 F.3d at 60 (staying case on primary jurisdiction grounds to permit agency to make tribal determination in light of need to resolve "issues of fact not within the ordinary ken of judges and which requir[e] administrative expertise'") (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)); Clinton & Hotopp, *supra*, at 67 (discussing the "general confusion in the courts over the nature of the evidence required to prove tribal existence" where federal recognition is lacking); Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L. Rev. 491, 495 (2003) (detailing the extensive process for tribal recognition employed by the Executive Branch, including the use of "a professional research team . . . . with specialized knowledge and experience in acknowledgment" to conduct an "extensive factual analysis" involving "30,000 pages to over 100,000 pages of documents").

Moreover, allowing court challenges to tribal existence in the face of explicit federal recognition by the political branches would be tremendously destabilizing – for Tribes and their members, for all that do business with them, and for the political branches as well. Although petitioner's attempted collateral attack on the Oneidas' tribal status arises in the context of the Nonintercourse Act, petitioner's proposed framework is arguably relevant not just to land claims, but to *all* assertions of sovereign authority by Tribes. Forcing Tribes to litigate and courts to resolve such matters in any lawsuit in which tribal status is conceivably implicated would waste judicial resources and impose a substantial financial and psychological burden on the Tribes. Even federally recognized Tribes would be required to amass a voluminous historical record to reestablish their tribal status in *any* case in which the tribal status is challenged.

Such a rule is patently unfair – indeed, an affront – to federally recognized Tribes, such as the Oneidas, that have relied on their longstanding treaty and trust relationship with the United States. Where there is official federal recognition, repeated relitigation of these issues imposes great costs with no corresponding benefit.

Challenges to tribal status are especially unwarranted in cases involving land claims because much of the potential evidence of discontinuity – *e.g.*, a reduction in tribal land – stems from the State's own unlawful purchase of the land in the first place. To hold that a Tribe's claim for illegally sold land is precluded by the Tribe's loss of that very land is the height of caprice. *Cf. Mashpee II*, 820 F.2d 480 (refusing to hold that the political branches are "estopped" from denying federal recognition to a Tribe, where the government bears responsibility for the Tribe's deterioration).

2. The case law just discussed disposes of petitioner's continuity attack. It is undisputed that the Oneidas were recognized by federal treaty as a Tribe in 1794, and neither petitioner nor Judge Van Graafeiland's dissent points to any formal (or informal) action by the political branches purporting to terminate tribal existence. The absence of such federal action withdrawing recognition at any time since 1794 conclusively established tribal continuity.[12]

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[12] Although this Court has not sought to catalogue exhaustively how the political branches can manifest their view that a Tribe no longer exists, it is clear that such intent will not be inferred absent a clear statement from Congress. *See United States v. Dion*, 476 U.S. 734, 738-39 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."). Indeed, a clear statement requirement follows from this Court's repeated holdings that state taxation of Indian land will not be allowed unless Congress had made its intent to allow such taxation clear. *See, e.g., County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)). Allowing the State to establish discontinuity at trial (and thus permit state taxation) without any clear statement from Congress would undermine this settled and oft-cited doctrine.



Nor is the absence of formal congressional or executive action withdrawing recognition the only relevant consideration here. To the contrary, the political branches have for more than 200 years continued to make payments to the Oneidas pursuant to the 1794 Treaty of Canandaigua. The political branches' unbroken fulfillment of their treaty obligations is an unmistakable affirmation by the political branches that the Oneidas have continuously existed.

Finally, the United States' present-day federal recognition of the Oneidas, *see, e.g.*, 68 Fed. Reg. 68,180 (Dec. 5, 2003) (annual list of federally recognized Tribes) – separate and apart from its longstanding historical relationship with the Tribe – is additional evidence that the political branches have not only failed to terminate tribal existence, but have affirmatively made a determination of continuity. Inherent in federal tribal recognition is a judgment that the Tribe has existed on a continuous enough basis to be recognized as the same historic entity with which the government has had relations throughout the history of the Nation:

> [T]he administrative decision to acknowledge a tribe acknowledges that an inherent sovereign still exists. The Department is not 'granting' sovereign status or powers to the groups, nor is it creating a tribe made up of its Indian descendants, when it determines that

> a group is an Indian tribe. Rather, the Department is acknowledging that the sovereign has existed continuously since historic times, retaining its inherent powers.

Coen, *supra*, at 499; *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) ("Federal recognition is just that: recognition of a previously existing status."). Indeed, "[t]he Department [of the Interior]'s position is, and has always been, that the essential requirement for acknowledgement is continuity of tribal existence rather than previous acknowledgement." 59 Fed. Reg. 9280, 9282 (Feb. 27, 1994). Federal recognition thus belies petitioner's claim that the existence *vel non* of continuity is an open question for the courts to determine.

**B. To The Extent That The Courts Have Any Role In Reviewing Tribal Status Or Continuity, That Role Is Not Implicated Where The Evidence Overwhelmingly Demonstrates A Tribe's Longstanding And Continuous Existence.**

Notwithstanding the political nature of determinations of tribal recognition and continuity, certain language from this Court's opinions has postulated an extremely narrow role for courts in policing the outer boundary of tribal recognition decisions. For example, in *United States v. Sandoval*, 231 U.S. 28 (1913), this Court cautioned that Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." 231 U.S. at 46. This Court has also stated that, with respect to tribal recognition, the Court "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker*, 369 U.S. at 217. But neither petitioner nor the Second Circuit dissent contends that the Executive



Branch's determination of continuous tribal existence is "manifestly unauthorized" so as to fall within this narrow exception.[13]

Nor could they. Based on the historical relationship between the federal government and the Oneidas (which has involved the United States' longstanding compliance with its treaty obligations, including the yearly payment of annuities), the political branches' recognition of the Oneidas both as a continuously existing Tribe and as the successor in interest to the original Oneida Tribe is reasonable and supported by substantial evidence. Indeed, this Court has already acknowledged that the current Oneidas are descended from the original Oneidas, *see Oneida II*, 470 U.S. at 230, so there is no serious argument that the Court's concern in *Sandoval* and *Baker v. Carr* – one of political arbitrariness – exists here.

In light of this substantial evidence supporting the federal government's determination of tribal existence and

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[13] Although this Court has never articulated the precise standards it would use to assess whether a tribal status determination made by the political branches was "manifestly unauthorized," *Baker*, 369 U.S. at 217, such review could be no *more* searching than the deferential review under the Administrative Procedures Act ("APA") that applies to tribal recognition decisions made pursuant to the federal acknowledgement regulations. *See, e.g., Miami Nation*, 255 F.3d at 348 (reviewing a federal acknowledgement determination under APA standards); 5 U.S.C. § 706 (APA standard of review). This Court need not determine here, however, whether the APA standard or an even more deferential standard of review would be appropriate, because, as demonstrated below, the United States's recognition of the Oneidas and their continuous existence would satisfy even the more searching APA standard of review.

continuity – namely, the longstanding annuity payments and the continuous relationship with the Tribe since 1794 – the few pieces of contrary evidence and stray statements by government officials that petitioner cobbles together are insufficient to call into question the political branches' decision under the deferential standard of review suggested by *Sandoval* and *Baker v. Carr*.

*First*, petitioner points to *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877), *see* Pet. Br. 43, and its language stating that the Oneida "tribal government has ceased," and that "[t]hey do not constitute a community by themselves." 25 F. Cas. at 1008. As an initial matter, *Elm* was based on a false premise: that Elm could not be a citizen (and thus had voted illegally) unless the Oneidas ceased to exist as a tribe. *See id.* at 1006-07. This Court has rejected that premise, *see, e.g.*, *United States v. Nice*, 241 U.S. 591, 598 (1916) (explaining that "[c]itizenship is not incompatible with tribal existence"), and *Elm* is thus entitled to little if any weight on the question of tribal continuity. Moreover, the *Elm* court *recognized* the functioning of the Oneida Tribe, which appointed chiefs and received annuities. *See* 25 F. Cas. at 1008. Thus, viewed in proper and modern perspective, *Elm* does not hold that the Oneidas ceased to exist. Indeed, that same court subsequently decided in *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920), that the Oneidas were a Tribe in continuous occupation of reservation land and had "not abandoned their tribal relations." *Id.* at 477-78, 481, 486. Given the respective nature and depth of these cases, *Boylan* provides the more credible account of the Oneidas' status; at the very least, it demonstrates the federal government's conclusions regarding tribal continuity are not arbitrary.



*Second*, petitioner cites to short excerpts from six government reports between the years 1891 though 1906, each of which allegedly establishes that the Oneidas ceased to exist. *See* Petr. Br. 43-45. Five of these six citations, however, are from United States reports that merely claim that the Oneidas have no reservation – not that their tribal structure ceased to exist. Tribal existence and reservation occupation are distinct issues, and petitioner's "evidence" thus does nothing to undermine the case for the Oneidas' continuous existence.[14] Moreover, these excerpts concerning reservation land are overwhelmed by extensive other evidence from that time period establishing that the Oneidas existed as a Tribe and, indeed, inhabited a reservation. For example, the Annual Reports of the Commissioner of Indian Affairs cited by petitioner reveal that the Oneidas existed throughout this time period, in substantial numbers, occupying a 350-acre "Oneida reserve," *see* 1870-1920 *Comm'r of Indian Affairs Ann. Reports*, and the maps accompanying those Annual Reports all display an Oneida Reservation for this challenged time period, *see id.*[15]

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[14] For the same reason, petitioner's citation of a 1950 Senate Report concerning the Oneidas' reservation, *see* Petr. Br. 45, proves nothing about the Oneidas' tribal status. In contrast, the Oneidas' tribal existence that year is demonstrated by correspondence from the Bureau of Indian Affairs memorializing the United States' payment of annuities to the Oneidas in 1950. *See* Letter from Bureau of Indian Affairs to William Rockwell (Oneida chief) of Aug. 28, 1950.

[15] The sixth source cited by petitioner for this time period is a New York census map from 1892, which "depicts no Oneida Reservation." Petr. Br. at 44. However, other portions of 1892 United States Extra Census Bulletin – which contains the cited map – confirm the Oneidas' tribal existence in that year. Among

Moreover, this is but a small portion of the evidence supporting the Tribe's continuous existence throughout the period from 1891-1906, when petitioner claims the Oneidas ceased to exist. New York's state census in 1892 and 1905 included population enumerations for the Oneida Reservation, *see* Francis M. Hugo, *Manual for Use of the Legislature of the State of New York* 270 (1918); Bureau of Indian Affairs census rolls throughout the period included populations of Oneidas, *see New York Iroquois Censuses, 1886-1924* (Heritage Books 2001); and newspaper reports throughout the period described meetings of the general council of the Oneida as well as the participation of the Oneidas in the Six Nations Council, *see, e.g.*, Oneida Semi-Weekly Union, July 15, 1893, at 2. Again, at the very least, this considerable evidence of the Oneidas' tribal existence neutralizes petitioner's scant evidence to the contrary and demonstrates that substantial evidence supports the federal government's recognition of the Oneidas' continuous existence.

*Finally*, petitioner points to two scraps of evidence post-dating *Boylan* (which confirmed the Oneidas' status as a Tribe). *See* Petr. Br. at 45. But the 1925 letter of an inferior

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other things, that Census Bulletin describes the Oneidas' population (212), depicts the Oneida Tribe's chiefs, and discusses the payment of annuities to the Tribe. *The Six Nations of New York: The 1892 United States Extra Census Bulletin* 6, 77-78 (Cornell Univ. Press 1995). Moreover, the 1892 Report of the Commissioner of Indian Affairs belies the census map cited by petitioner, as it both refers to the "Oneida Reserve" and displays the Oneida Reservation on an accompanying map. *See* 1892 *Comm'r of Indian Affairs Ann. Report*. Thus, at the very least, substantial evidence supports the political branches' conclusion that the Oneidas have existed continuously, including in 1892.



government official proves nothing, given the United States government's official position, as reflected in *Boylan* and elsewhere, that the Oneidas existed as a Tribe. Petitioner's snippet from Cohen's 1942 treatise likewise proves nothing, as Cohen was merely quoting from a 1915 memorandum (*i.e.*, pre-dating *Boylan*), which he did not present as historical fact.

In the face of the substantial – indeed, overwhelming – evidence of the Oneidas' continuous tribal existence, the sources cited by petitioner come nowhere close to raising a question of fact that would implicate the "arbitrariness" limitation alluded to in *Sandoval* and *Baker v. Carr*. Thus, there is no basis for disturbing the Second Circuit's affirmance of the grant of summary judgment on the question of continuous tribal existence. Pet. App. 44a.

## CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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